



**Nicholus v Attorney General & 14 others; National Environmental
Complaints Committee (NECC) & 5 others (Interested Parties) (Civil
Appeal 42 of 2021) [2023] KECA 34 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 34 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 42 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
FEBRUARY 3, 2023**

BETWEEN

ABIDHA NICHOLUS APPELLANT

AND

ATTORNEY GENERAL & 7 OTHERS 1ST RESPONDENT

JOSEPH ANDEERE NYAANGA 2ND RESPONDENT

OWANG' ISAACK OGWEYO 3RD RESPONDENT

**CABINET SECRETARY, MINISTRY OF PETROLEUM AND
MINING 4TH RESPONDENT**

**CABINET SECRETARY ENVIRONMENT AND FORESTRY 5TH
RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 6TH
RESPONDENT**

COUNTY COMMISSIONER, SIAYA COUNTY 7TH RESPONDENT

**KENYA POWER & LIGHTING COMPANY LIMITED & 7
OTHERS 8TH RESPONDENT**

AND

**NATIONAL ENVIRONMENTAL COMPLAINTS COMMITTEE
(NECC) INTERESTED PARTY**

COMMISSION ON ADMINISTRATIVE JUSTICE INTERESTED PARTY

KATIBA INSITUTE INTERESTED PARTY

KITUO CHA HAKI INTERESTED PARTY



ACACIA EXPLORATION KENYA LIMITED INTERESTED PARTY
MCA EAST ASEMBO WARD INTERESTED PARTY

(Appeal from the decision and orders of the Environment and Land Court at Kisumu (Ombwayo, J.) dated 2nd February, 2021 in ELC PETITION NO. 7 OF 2020)

JUDGMENT

Judgment of Tuiyott, JA

1. The quest by Abidha Nicholus, the appellant, to halt certain mining activities in Ramba area, East Asembo Ward within Rarieda Sub-location suffered a setback when, on March 15, 2021 Ombwayo, J, struck out his petition for want of jurisdiction.
2. In that petition being ELC Petition No 7 of 2020 (the petition), the appellant sued 8 respondents, The Attorney General, Joseph Andeere Nyaanga, Owang' Isaac Ogweyo, the Cabinet Secretary, Ministry of Petroleum and Mining, the Cabinet Secretary Environment and Forestry, National Environmental Management Authority (NEMA), County Commissioner, Siaya County, Kenya Power & Lighting Company Limited (KPLC). Cited as interested parties were; The National Environmental Complaints Committee (NECC), Commission on Administrative Justice(CAJ), Katiba Institute, Kituo Cha Haki, Acacia Exploration Kenya Limited and Member of County Assembly East Asembo Ward.
3. The appellant is the owner of LR No Siaya/Ramba/788 and says he acquired interests in the lower parts of LR No Siaya/Ramba/219 and 720, both of which touch River Odundu. In 2019, the 2nd and 3rd respondents (jointly the miners) commenced mining operations on LR No. Siaya/ Ramba/ 716. The appellant and some members of the Ramba community questioned the two miners in regard to their licences/permits or authorizations but were rebuffed. On April 9, 2019, the appellant wrote to the 4th, 5th and 6th respondents requesting for information about the mining activities. In doing so, the appellant contends to have invoked his right to information under article 35(1) of the Constitution and certain provisions of the Access to Information Act. Again, no response or explanation was forthcoming.
4. It was the case of the appellant that only upon seeking the intervention of the CAJ ,that NEMA wrote, on August 26, 2019, stating that the miners had submitted an Environmental Impact Assessment (EIA) Report for an existing small scale artisanal gold mining activity at San-Martin Ramba, specifically on Siaya/Ramba/711. Critical in the communication was that NEMA had issued a stop order of the impugned mining activities until licences were received from it and the Ministry of Mining. The stop order had been with effect from July 31, 2019. The appellant complained that even after this date, the miners continued, and in fact ramped up the mining activities under the watch of the 1st and 4th to 7th respondents, NEMA included.
5. Around June, 2020, the appellant received information that the 4th respondent had obtained a prospecting licence covering Ramba area in the name of AfriOre International (Barbados) Limited which was later transferred to Acacia Exploration Kenya Limited (Acacia). At about the same time the 5th respondent (perhaps NEMA) issued an EIA licence over the same area to an entity unrelated to the activities of the two miners. Upon inquiry, Acacia indicated it was not connected with those activities. The grievance by the appellant is that the miners continue with their activities unabated and boast of their 'prowess' (perhaps patronage) of powerful businessmen and politicians.



6. Elsewhere, the appellant averred that he had received information that the miners had invaded his property, Ramba 788. Also that KPLC, without his consent, had dug holes and erected electricity poles thereon. In addition, the miners dumped waste or effluent from their mining shaft on to plot 788 and the lower portion of plot 719. This pollution is said to extend to the adjacent River Odundu.
7. There are other complaints but as this appeal does not invite a discussion of the merit of the petition, it is needless to state them all. In the end the appellant sought the following multiple orders and declarations:
 1. A declaration that the 1st to 7th respondents have jointly and severally violated the rights and continue to violate the rights and fundamental freedoms of the petitioner and the Ramba community contrary to articles 10, 27(1), 28, 35(1), 42, 43(1), 47, 69(1), 73 and 75 of the Constitution.
 2. A declaration that the petitioner's right to property has been violated by the 2nd, 3rd and 8th respondents;
 3. A declaration that the mining activities including leaching and gold processing carried out in Ramba area by the 2nd & 3rd respondents have been irregular, illegal and unconstitutional;
 4. A declaration that the 1st, 4th, 5th, 6th and 7th respondents are guilty of failing to enforce and abide by relevant provisions of the Constitution, EMCA, Mining Act, Fair Administration Actions Act, Access to Information Act and all international treaties and conventions as far as mining activities in Ramba area is concerned;
 5. An order of mandamus compelling the 1st, 4th, 5th and 6th respondents to supply the petitioner or any member of Ramba area with all mining records touching on Ramba area since 1988 including but not limited to copies of:
 - a. Licence or permits issued for mining/prospecting/reconnaissance or retention in that area;
 - b. Environmental impact assessments report and licences;
 - c. Environmental bonds or securities;
 - d. Agreements between the community and mining entities/individuals;
 - e. Scientific research or inspection reports carried out by the 6th respondent regarding the impact of chemicals, mining activities and environmental pollution/conservation;
 - f. Effluent discharge licence;
 - g. Reports by the Mineral Rights Board under section 52 of the Mining Act;
 - h. Annual financial reports of the 2nd and 3rd respondents as per section 53 of the Mining Act;
 - i. Records under section 79 of the Mining Act regarding:
 - i. Special licence numbers 123 and 213, and
 - ii. Prospecting licence number PL/2019/0226.



- j. Copies of all maps, geological reports on sample analysis, cores, logs & tests, aerial photographs and other data obtained and financial reports on mining activities relating to Ramba area;
 - k. Report on use of mercury and other chemicals, gases and fumes from the mining activities within Ramba area.
6. An order of certiorari for purposes of quashing any decision by the 4th, 5th and 6th respondents to issue any permit and/or licenses for mineral rights in Ramba area issued in blatant breach of the [Mining Act](#), EMCA and other relevant treaties and conventions;
 7. An order of prohibition prohibiting the 4th, 5th and 6th respondents from supporting, supervising and/or issuing any licence or permit for mineral rights in Ramba area without public participation and in blatant violation of the [Constitution](#), [Mining Act](#) and EMCA;
 8. A Conservatory order restraining/prohibiting the 1st and 2nd respondents either by themselves, agents, hirelings, hoodlums, servants and workers or persons working on their behalf from continuing with threats to the life of the petitioner, disposal of wastes/effluents on Plots Ramba 788, 719 and River Odundu, trespass on plot 788 or any actions/activities likely to interfere with the petitioner's right to life, property and clean environment as protected under articles 40 and 42 of the [Constitution](#);
 9. An order under article 70(2) (a) & (b) of the [Constitution](#) compelling the 1st, 2nd, 3rd, 4th, 5th and 6th respondents to restore to the original state or an environmental apt status the areas within Ramba which have been polluted, degraded and violated because of reconnaissance, prospecting, mining, leaching or gold processing activities. And to stop, prevent and discontinue further pollution and degradation occasioned by the 2nd and 3rd respondent or any other person/or entity mining, prospecting, leaching, processing gold or conducting connected activities without compliance with the [Constitution](#), the [Mining Act](#) and EMCA;
 10. An order that the 2nd, 3rd and 8th respondent do pay damages for trespass and/or infringement of the petitioner's right to property known as Ramba/No 788 in Rarieda Sub County;
 11. An order of compensation and/or damages;
 - a. Against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents under article 70(2)(c) of the [Constitution](#) for violation of the rights of the petitioner and residents of Ramba area under article 42, 43(1), 69(1) and 70(1) of the [Constitution](#);
 - b. Against the 1st, 4th, 5th, 6th and 7th respondents for violating his rights under article 47 of the [Constitution](#) envisaged under section 11(1)(j) & (2)(d) of the Fair Administrative Actions Act, and
 - c. Compensation for members of Ramba area for the historical sufferings, damages, loss of lives and environmental degradation/pollution to land, air and water.
 12. An order that costs of this petition be borne by the respondents.
8. The petition met jurisdictional objections on two fronts; that the appellant had not invoked or exhausted the dispute resolution mechanism provided under sections 129(1), (2), (3) & (4) of the [Environmental Management Conservation Act](#) (EMCA); and that the petition offended the provisions



of section 3 (1), 10, 11 (e), (f), (i), (k) & (l), 23,24,36,40,42 and 224 (2) (e) of the [Energy Act](#), 2019, regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations 2012 as read with articles 159 (2)(c) and 169 (1) (d) of the [Constitution](#) and sections 9 (2) and (3) of the [Fair Administrative Action Act](#), 2015.

9. The ELC (Ombwayo, J) upheld both objections hence this appeal. While the appeal raises 13 grounds, there was consensus by the parties that those can be condensed and determined under the following heads of discussion: -

- i. Whether the court's determination was sua sponte and without reasons.
- ii. Whether the court ignored the issues raised in the petition.
- iii. Whether the court erred in finding that it lacked jurisdiction regarding the 2nd respondent's preliminary objection.
- iv. Whether the court erred in abstaining from considering issues raised against the 8th respondent.

10. The appellant, a lawyer who appeared in person, argued that the trial court not only expanded the scope of the preliminary objection raised by the 2nd respondent, but also went ahead to raise and decide sua sponte thereby depriving the appellant a right to fair hearing contrary to article 19 (1) & (3), 20 (i), (3) & 4, 21 (1), 22 (1), 47, 48 and 50 (1) of the Constitution. The gravamen of the complaint is that the 2nd respondent only sought to strike out a portion of the petition dealing with the environment and nothing more. To demonstrate the apparent error by the court, the appellant asserts that other than the 2nd and 8th respondents, none of the other parties to the petition raised a jurisdictional challenge.

In support of his submissions, the appellant refers to the decision in *Owners and Masters of the Motor Vessel 'Joey' vs Owners and Masters of the Motor Tugs 'Barbara' and 'Steve B'* [2008] 1 EA 367 where it was held:-

' There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.'

11. In the end, on this first issue, the appellant argues that having raised the more expansive matter sua sponte, the trial judge ought to have given parties an opportunity to address him on it ([Nagendra Saxena -vs- Miwani Sugar Mills Limited & 3 others \[2011\] eKLR](#)).

12. We are told that the petition raised various issues which the trial court failed to consider. Those are; breach of right to access to information and fair administrative action; threat of right to life; right to a clean and healthy environment; noncompliance with mining laws; and right to property.

13. Attacking the objection by NEMA, the appellant submits that it did not specify the environmental issues in the petition over which the ELC lacked jurisdiction. In addition, while NEMA invited the court to find that any issue concerning the environment ought to be channeled to NEMA and the appellate jurisdiction that lay with the National Environmental Tribunal (NAT), the ELC held;

' This court agrees with the submissions that articles 22, 162(2) of the [Constitution](#) of Kenya 2010 and section 13(1) (2) of the [Environment And Land Court Act](#) confer jurisdiction to the court to hear and determine disputes relating to the environment, the use, the occupation of, and title, to land. Specifically, section 13(1) provides that the court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the [Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land and that in exercise of its



jurisdiction under article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; to compulsory acquisition of land relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;

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

In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court. However, the court jurisdiction in relation to disputes reserved for National Environmental Authority and the National Environmental Tribunal is restricted to the appeals emanating from the tribunal.'

14. The ELC was assailed as having failed to probe the actions taken by the appellant prior to filing the petition. Whilst the dispute was not limited to pollution, the court ignored the fact that the appellant lodged a complaint with NEMA and the CAJ and that when NEMA eventually responded, it confirmed that the miners did not have permits or licences and issued a stop order. Having obtained a favourable order, the appellant had fully complied with the provisions of EMCA and the appellant was no longer an aggrieved party and had no reason to lodge an appeal to NET pursuant to section 129 of EMCA.
15. This court is further asked to find that while the ELC appreciated that nothing in the ELC Act precluded it from hearing and determining applications for redress of a denial, violation or infringement of or threat to rights or fundamental freedoms it nevertheless, in a contradictory manner, held that all matters of pollution must be channeled to NEMA.
16. Turning to the objections under the Energy Act, the appellant makes the argument that, jointly with the two miners, KPLC trespassed onto the appellant's property, Siaya /Ramba 788. The action is said to be arbitrary and outside the scope of the provisions of the Energy Act. It was contended that the mechanisms under the Energy Act can only be activated if and when KPLC abides by the provisions of that statute. In support, the appellant cites the decision in Ayadem Company Limited vs Kenya Power & Lighting Company Limited [2017] eKLR where the court held:

' Failure by the respondent to abide by the provisions of the Energy Act meant that the petitioner's only recourse was to move to this court. in his replying affidavit, John Muriuki deponed in paragraph 17 that this court should refer the dispute to the commission. The court would not have had any problem taking that route. However, it is clear from the petition herein that the respondent has already erected its power lines on the suit property. It is therefore already too late to invoke the provisions of section 48 (2) of the Energy Act which empowers the commission to determine the damage and compensation payable.'
17. Another assertion made is that having denied that it was not responsible for the alleged trespass and that the land in issue was not demarcated, KPLC was raising a plea of misjoinder. In that event the court ought to have interrogated whether or not there was an issue for reference to the Energy and



Petroleum Tribunal instead of striking out part of the petition. To buttress this point, the appellant asks this court to consider the following reliefs he sought:

' Declaration that the petitioner's right to property has been violated by the 2nd, 3rd and 8th respondents.

An order that the 2nd, 3rd and 8th respondent do pay damages for trespass and/or infringement of the petitioner's right to property known as Ramba/ No 788.'

and find that the ELC erred in declining jurisdiction.

18. The appellant concludes by submitting that the ELC misapplied the principle of exhaustion and we were urged to give regard to the following passage in [*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.'

Further that the relief to be granted was not to strike out the claim. Cited in support was the Supreme Court decision in [*Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others*](#)[2020] eKLR.

19. Responding to the appeal, NEMA asserted that the objection in respect of EMCA was not determined suo sponte as all parties were fully involved in their submissions and responses. It was argued that while the petition contained issues worthy of hearing, they fell under the jurisdiction of the NET and the Energy Regulatory Commission (must have meant the Energy and Petroleum Regulatory Authority (EPR)) and the ELC did not misinterpret the issues raised by the appellant, but rather followed the law and the principle of fair administration in deciding to lay down its tools and dismissing the petition once the issues of jurisdiction and the exhaustion doctrine were raised. Further, that the trial court properly applied the doctrine of judicial abstention as well as judicial restraint. Reference was made to the following passage in Benson Ambuti Adega (supra):

' [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 US 496 61 S Ct 643, 85 L Ed 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in *England v Louisiana State Board of Medical Examiners*, 375 US 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.

did not have the jurisdiction to hear and determine the petition, the appellate court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.'

20. KPLC's answer to the appeal was that section 36 of the *Energy Act* 2019 vested in the EPT exclusive original jurisdiction regarding matters arising from the *Energy Act* 2019 and sought support in the decision in *Elijah Mutabi & 10 others vs Kenya Power & Lighting Company Limited [2020] eKLR*. We are asked to disregard the decision in *Ayadem Company Limited (supra)* as it was determined before the coming into operation of the *Energy Act*, 2019.

21. On the doctrine of exhaustion, KPLC cites article 159(2)(c) of the *Constitution* which requires courts and tribunals, in exercise of judicial authority, to promote alternative forms of dispute resolution. KPLC also relies on section 9 of the *Fair Administrative Action Act* whose import was discussed in the decision of *Night Rose Cosmetics [1972] Limited vs Nairobi County Government & 2 others [2018] eKLR* where the court observed:

' I should emphasize that the use of the word shall in section 9 of the Act cited above is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.

[21] There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The word 'shall' when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory.'

22. KPLC reiterates that the appellant had not exhausted all the alternative dispute resolution mechanism available to him and the trial court was correct in upholding the preliminary objections.

23. This first appeal raises issues of law only. distilling the submissions made by the parties in the context of the grievances raised by the appellant in the memorandum of appeal, I see the following issues as requiring our determination:

- i. Did the appellant exhaust the dispute resolution mechanism provided by EMCA in respect to his complaints regarding the right to a clean and healthy environment?
- ii. Were the complaints against KPLC resolvable, in the first instance, under the dispute resolution mechanism provided under the *Energy Act* and if so did the appellant exhaust that mechanism?
- iii. Did the appellant's petition disclose a cause of action or actions that fell outside EMCA and the *Energy Act*?



- iv. If the appellant had failed to exhaust the alternative dispute resolution mechanisms available under EMCA or the *Energy Act* or both, but the petition nevertheless raised other issues outside the two statutes, what orders should the ELC have made?
26. The provisions of article 159(2) (c) of the *Constitution* and section 9 of the *Fair Administrative Action Act* mainstream alternative dispute resolution mechanisms in the exercise of judicial authority and as a corollary, the principle of exhaustion (see for example the decision in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR*). This is not contested by the parties herein. Indeed, as regards the complaints made regarding alleged violations of his right to a clean and healthy environment, the appellant acknowledges that his first port of call was to invoke the mechanism provided by EMCA and he sought to demonstrate that he had done so. The appellant narrates how, through a letter dated April 9, 2019, he wrote to NEMA complaining about the activities of the 2nd and 3rd respondents. After a lapse of about four (4) months, NEMA responded to the appellant's complaint through a letter of August 26, 2019 in which it stated:

August 26, 2019

NEMA/PR/S/2/22027

Abidha Nocholus O P

Abidha & Company Advocates PO Box 19365 – 00100 NAIROBI

Email: abidhaandcompanyadvocates@gmail.com Tel: 0725394442

Mining activities in San Martin area-east AsemboB Ward in Rarieda Sub-county within Siaya County

The above subject refers.

Reference is made to your letter Ref: Misc/ANB/001 dated July 23, 2019 requesting for information on the above matter. The authority would wish to inform you that it is in receipt of an Environmental Impact Assessment (EIA) report Ref: NEMA/PR/S/2/22027 for an existing small scale artisanal gold mining at Sanmatin, Ramba on LR No: Siaya/Ramba/711, Rarieda Subcounty, Siaya County by Joseph Andere Nyaanga and Owang' Isaack Ogweyo of PO Box 51 Nyatike as proponents of the project. The EIA report was received on June 12, 2019 and it is currently under review.

Further to the above information, the authority's environmental inspectors undertook a site inspection of the above stated site and issued a stop order of the mining activities until requisite licences are received from NEMA and ministry of mining. The stop order has been in effect from July 31, 2019.

A copy of the above referenced EIA report is available for perusal at NEMA headquarters in Nairobi and at the NEMA Siaya county office.

Zephania Ouma

For: Director general

27. The appellant submits that NEMA issued an order that was favourable to him but failed to enforce it and as he was not an aggrieved party he would have no reason to lodge an appeal to the NET pursuant to section 129 of EMCA.
28. Section 129 of EMCA provides:



129. Appeals to the tribunal

1. Any person who is aggrieved by—
 - a. The grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
 - b. The imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
 - c. The revocation, suspension or variation of the person's licence under this Act or its regulations;
 - d. The amount of money required to paid as a fee under this Act or its regulations;
 - e. The imposition against the person of an environmental restoration order or environmental improvement order by the authority regulations, under this Act or its may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the tribunal in such manner as may be prescribed by the tribunal.
2. Unless otherwise expressly provided in this Act, where this Act empowers the director-general, the authority or committees of the authority or its agents to make decisions, such decisions may be subject to an appeal to the tribunal in accordance with such procedures as may be established by the tribunal for that purpose.
3. Upon any appeal, the tribunal may—
 - a. Confirm, set aside or vary the order or decision in question;
 - b. Exercise any of the powers which could have been exercised by the authority in the proceedings in connection with which the appeal is brought; or
 - c. Make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;
 - d. If satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;
 - e. If satisfied upon application by any party, review any orders made under paragraph (a).
4. Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon commencement of this section unless the tribunal, upon application by a party to the appeal, issue fresh orders maintaining the status quo in accordance with subsection (3)(a).

29. The stop order was issued pursuant to powers granted to NEMA under section 108 to issue environmental restoration orders. Disobedience of a restoration order attracts penal consequences. Any person who fails, neglects or refuses to comply with an environmental restoration order commits an offence, and on conviction is liable to imprisonment for a term of not less than one year and not more than four years or to a fine of not less than two million shillings and not more than four million shillings or to both such fine and imprisonment (section 143 of the Act).



30. By dint of section 9 (1) of the Act, NEMA has the important role of exercising general supervision and coordination over all matters relating to the environment and is the principal implementor of government policies relating to the environment. One of the powers given to an environmental inspector, an officer of NEMA, is in section 118 of the Act which reads:
118. Environmental inspector's powers to prosecute subject to the Constitution, section 29 of the Office of the Director of Public Prosecutions Act and the directions and control of the Director of Public Prosecutions, an environmental inspector may, in any case in which he considers it desirable so to do—
- a. Institute and undertake criminal proceedings against any person before a court of competent jurisdiction (other than a court martial) in respect of any offence alleged to have been committed by that person under this Act; and
 - b. Discontinue at any stage with the approval of the Director of Public Prosecutions, before judgment is delivered any such proceedings instituted or undertaken by himself.
31. As I understand it, the complaint of the appellant against NEMA is that NEMA failed to enforce the stop order it had issued. I think it would have been available to NEMA, through an environmental inspector, to institute and undertake criminal proceedings against the 2nd and 3rd respondents if the two failed to comply with the stop order. Having failed to make the decision to do so, NEMA would be failing in its duty and its inaction and dereliction of duty could, in my view, be a proper subject of proceedings by the appellant against NEMA. The definition of a decision in section 2 of The Fair Administrative Action Act includes an administrative or quasi-judicial decision that is required to be made. A decision not to enforce the stop order is a decision that would fall within the contemplation of section 129 (2) of the Act which for its importance to the matter at hand is reproduced;
- (2) Unless otherwise expressly provided in this Act, where this Act empowers the director-general, the authority or committees of the authority or its agents to make decisions, such decisions may be subject to an appeal to the tribunal in accordance with such procedures as may be established by the tribunal for that purpose.
32. In addition, two of the prayers of the petition belie that the jurisdiction of the matters touching on the environment was elsewhere. The appellant seeks the following orders in prayers (6) and (7);
1. An order of certiorari do issue to bring to this court for purposes of quashing any decision by the 4th, 5th and 6th respondents to issue any permit and/or licenses for mineral rights in Ramba area issued in blatant breach of the Mining Act, EMCA and other relevant treaties and conventions;
 2. An order of Prohibition prohibiting the 4th, 5th and 6th respondents from supporting, supervising and/or issuing any licence or permit for mineral rights in Ramba area without public participation and in blatant violation of the Constitution, Mining Act and EMCA;
33. In so far as the appellant faults certain decisions made by NEMA regarding issuance of licences and permits to the miners, those issues squarely fall within the jurisdiction of the NET and I have to endorse the finding of the trial court that:

' The dispute before me revolves on the mining activities of the 2nd and 3rd respondents at the Ramba area including the processing of gold and the pollution that is resultant from the processing of the gold. This issue falls within the powers of the NEMA as it revolves on issuance of a licence and pollution. Section 7 of Environment and Co-



ordination Act (EMCA) (cap 387) Laws of Kenya establishes NEMA and section 9 sets out its objects that include co-ordination of the various environmental management activities being undertaken by the lead agencies and promotion of the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya.'

34. Attention now turns to allegations made against KPLC. These are in paragraphs 95 to 100 of the petition. Paragraph 100 specifically sets out the grievances against KPLC as follows:

100. The petitioner shall show that the 8th respondent working in cahoots with the 2nd and 3rd respondents breached sections 170, 171, 172, 173, 174 and 175 of the Energy Act to the extent that:

- a. The 8th respondent did not bother to communicate to the petitioner its intentions to install electric pole on the said property or that power line was to pass over the same;
- b. It failed to reach out to the petitioner as envisaged in the Energy Act through advertisement or any other mode of communicating;
- c. It trespassed onto the said property, dug holes thereon and erected electric pole without the permission of the petitioner.
- d. It failed to compensate the petitioner as envisaged in the Energy Act;
- e. It failed to explain to the petitioner the capacity of the current in the power lines hanging over the subject land;
- f. It has ignored, neglected and or declined to respond to the demand by the petitioner; and
- g. Its trespass and/or breach of the petitioner's right to property continues to date as the said electric pole and the electricity lines still stand and hang over the said property, respectively.

35. The ELC correctly analyzed the purport of section 3 of the Energy Act 2019 when it observed:

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

36. At the very heart of the appellant's grievance is that KPLC trespassed on his property and unlawfully dug holes and erected electricity power lines on it. As submitted correctly by counsel for KPLC, KPLC is listed as one of the energy sector entities within the country under the third schedule of the Energy Act.

37. The dispute resolution mechanism envisaged by the Energy Act is three tiered. The first is to raise a complaint with the Energy and Petroleum Regulatory Authority (EPRA), the successor of the Energy Regulatory Commission (ERC). The Energy Act, 2019 repealed the Energy Act No 12 of 2006 but notwithstanding the repeal are the transitional provisions of section 224(2)(e) which reads;

Notwithstanding the provisions of sub-section (1)— (a)



- (e) any subsidiary legislation issued before the commencement of this Act shall, as long it is not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all purposes, be deemed to have been made under this Act.
38. One of the subsidiary legislations saved by these provisions is the Energy (Complaints and Dispute Resolution) Regulations 2012 which are the regulations still used by EPRA as the successor of ERC. Regulation 4 (a) provides:
4. These regulations shall apply to complaints and disputes in the following areas—
 - a. billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.
39. Regulation 7 reads:
7. (1) In the event that any complaint is not resolved to the satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to regulation 5, the parties may declare a dispute, and both or any one of them may refer it to the commission for recourse.
 2. A party to a dispute may refer the dispute to the commission in form S-2 as set out in the second schedule.
 3. Where a dispute has been referred to the commission, the commission shall appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.
 4. Where the dispute-
 - a. is resolved through mediation in accordance with paragraph (3), the parties shall file their settlement agreement with the commission within five days, and the agreement shall be final and binding on both parties.
 - b. is not resolved through mediation in accordance with paragraph (3), the procedures set out in regulations 8 to 16 shall apply.
40. Given that the complaint by the appellant as against KPLC relates to a way leave for transmission, then the first forum for resolution of that dispute would be before the EPRA. A party dissatisfied with the decision of the authority can invoke the second tier which is a right of appeal to the Energy and Petroleum Tribunal whose jurisdiction is provided by section 36 of the [Energy Act](#):
36. Jurisdiction of the tribunal
1. The tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
 2. The jurisdiction of the tribunal shall not include the trial of any criminal offence.
 3. The tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.



4. The tribunal shall have appellate jurisdiction over the decisions of the authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re- consideration.
 5. The tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
 6. The tribunal shall hear and determine matters referred to it expeditiously.
41. Only upon exhaustion of the appellate process before the Energy and Petroleum Tribunal can a matter be escalated to the High Court. This is the third tier. In this regard section 37(3) provides;
 - (3) Any person aggrieved by a decision of the tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.
 42. The remedies that the tribunal can grant are wide and include injunctions, penalties, damages and specific performance. We are not told by the appellant that he would not have obtained an efficacious relief had he taken the route envisaged by the *Energy Act* and I have no doubt that the ELC was correct in declining jurisdiction in respect to the grievances against KPLC.
 43. Even having reached the decision that the disputes against NEMA and KPLC needed to be heard elsewhere, there are other disputes which would fall outside those frameworks. Just by way of example are the complaints that the miners were operating in disregard to the provisions of the *Mining Act*; there was a breach of right to life, right to property and breach of access to information and fair administrative action. If I was to agree that some of these matters were properly before the ELC then an issue arises as to the nature of orders that the ELC should have made after declining to entertain the environment and energy disputes. This in, my view, is the critical issue that this appeal raises.
 44. The appellant contends that the impugned decision disregarded the principles enunciated by the Supreme Court in *Benson Ambuti Adega (supra)* in striking out the entire suit.
 45. The respondents on the other hand urged us to frown upon the practice of courts arrogating themselves jurisdiction when faced with multifaceted claims where original jurisdiction to determine some of the claims are legislatively conferred on other forums and institutions (*Eaton Towers Limited v Kasing'a & 5 others (Civil Appeal 49 of 2016) [2022] KECA 645 (KLR)* (28 April 2022) (judgment)).
 46. The appellant had in mind the following observation of the Supreme Court in *Benson Ambuti Adega (supra)*:
 - ' (53) Applying these principles to the instant petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th respondent to the 1st, 2nd and 3rd respondents. The court should have reserved the issues pending the outcome of the decision of the tribunal, thereby affording any aggrieved party the opportunity to appeal to the court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under article 50 of the *Constitution* was protected.'



47. In Eaton Towers Limited (supra) this court strongly stated:

' 40. We state categorically and without equivocation that the multifaceted nature of any petition, or suit for that matter, is not a basis to find a court to arrogate jurisdiction to itself. This court already made a finding on this issue and castigated such reasoning in Kibos Distillers Limited & 4 Others -vs- Benson Ambuti Adega & 3 Others [2020] eKLR;

' In the instant matter, the learned judge citing the case of Ken Kasinga -vs- Daniel Kiplagat Kirui & 5 others, [2015] eKLR, and other decisions from courts of coordinate jurisdiction held that where a claim in a petition or suit is multifaceted, a court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting of pleadings - that all that a litigant need to do is to draft pleadings such that claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping.'

41. Despite acknowledging that the petition might as well have been filed as an ordinary suit, as counsel for the 1st respondent acknowledged, the learned Judge held;

' [I]f I am to fail to address the issues in this petition, the recourse of the petitioner will be to file a new suit, which I would still have to hear. I am guided by article 159 of the Constitution to do justice without undue regard to procedural technicalities.'

42. This cannot be good law and it remains unacceptable for a court to consider that convenience is enough ground to confer jurisdiction. In as much as the learned judge, in his position at the ELC could hear both ordinary suits and constitutional petitions touching on land, he ought to have taken judicial notice of the fact that both avenues, though leading to his judicial 'seat', nonetheless confer separate jurisdictions with separate procedures that must strictly be adhered to. The notion that non-exhaustion of all prior forums does not strip the constitutional court of jurisdiction is erroneous and should not gain traction.'

48. The Supreme Court took the view that even where a court declines to hear a multifaceted suit because it lacks original jurisdiction in respect to some of the causes of action, still the court should fashion orders that do not impede a party's right to fair hearing in respect to the matters which are properly before it. One way suggested by the apex court is for the trial court to reserve those issues properly



before it pending the exhaustion of the dispute resolution mechanism of the other matters. It seems to me that the order to be made by a court will depend on the peculiar circumstances of each case. While a court should not make an order that can be construed as impinging on a party's right to fair hearing, it must always be vigilant so that its process is not abused. A court has no business making benign orders in favour of a party who has deliberately and in bad faith crafted pleadings so as to cheat jurisdiction. In addition, a court will not be kind to a party who persists in filing a multifaceted claim even in the face of a warning that the claim will be challenged on the question of jurisdiction.

49. How did the matter at hand fare? the responsibility to bring a petition that was not multifaceted was always on the petitioner. Confronted by the objection, he had the option to seek leave to amend his petition so as to trim off matters that belonged elsewhere in the first instance. Instead, he ploughed on, and he has to live with the risk he took. Having reached the correct decision that it lacked original jurisdiction in respect to certain claims in the petition, the ELC had no business splitting the petition on behalf of the appellant so as to retain matters it would properly be seized of. At any rate, I do not think that the order eventually made by the ELC can be said to be inimical to the petitioner's right to fair hearing. The order made was for striking out as opposed to a dismissal. Nothing forecloses the appellant, subject to the law of limitation, from mounting another suit but leaving out the matters under the EMCA and the *Energy Act*. The final order made by the ELC was therefore not made suo sponte as it was one available to the court after reaching the decision that it lacked original jurisdiction in respect to some of the claims in the multifarious petition.

50. I would propose that the appeal be dismissed with costs.

Judgement of Mumbi Ngugi JA

1. I have read in draft the judgment of Tuiyott JA with which I agree fully and have nothing to add.

Judgment of Kiage, JA

1. I have had the benefit of reading in draft the judgment of Tuiyott, JA. I entirely agree with it and have nothing useful to add.

2. As Mumbi Ngugi, JA is in agreement, the appeal shall be disposed of as proposed by Tuiyott, JA.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF FEBRUARY, 2023.

F TUIYOTT

.....

JUDGE OF APPEAL.

PO KIAGE

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certified that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR

