Legal Advice Centre t/a Kituo Cha Sheria v National Environment Management Authority & 5 others (Petition E002 of 2023) [2024] KEELC 4133 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4133 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION E002 OF 2023

EK MAKORI, J

MAY 9, 2024

IN THE MATTER OF: 1, 2, 10, 11, 19, 20, 21, 22, 23, 24, 42, 43, 60, 69, 70, AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE CONVENTION ON BIOLOGICAL DIVERSITY

AND

IN THE MATTER OF: THE NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION OF THE CONVENTION ON BIOLOGICAL DIVERSITY

AND

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

AND

ENVIRONMENTAL MANAGEMENT AND COORDINATION

BETWEEN

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA ..... PETITIONER

AND

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

KENYA FOREST SERVICE ..... 2ND RESPONDENT

COUNTY GOVERNMENT OF KILIFI ..... 3RD RESPONDENT

MINISTRY OF ENVIRONMENT AND FORESTRY ..... 4TH RESPONDENT

KENYA PLANT HEALTH INSPECTORATE SERVICE ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

RULING

1. On 18th May 2023, this Court, after hearing a Preliminary Objection brought by the first respondent and supported by the other respondents, made the following orders:

> " The upshot is that the Preliminary Objection raised succeeds partially as follows:
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> i. The notice of motion dated is hereby dismissed
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> ii. The Petition partly collapses on ALL aspects relating to licensing now within the purview of NET 45 of 2022 Omar Salim Mwakweli and Others V NEMA and Georgy Gvasaliya.
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> iii. The pending Constitutional violation claims are hereby stayed pending the determination of NET 45 of 2022 Omar Salim Mwakweli and Others V NEMA and Georgy Gvasaliya.
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> iv. As this is public interest litigation, costs are to be borne by each party at this stage."

2. The petitioner, through an application dated 19th June 2023, has brought to the Court's attention the need to reconsider new evidence and legal arguments that they believe significantly warrant a review of the court's orders. They argue that the balance of constitutional issues should be thoroughly tried. The respondents, on the other hand, are opposing this request.

3. The Court directed parties to file written submissions to dispose of the application.

4. The Court will determine whether to review its orders and hear the petition on merit before it, with the attendant costs. This intricate legal matter involving constitutional violations, international treaties, and environmental management demands thorough and meticulous consideration.

5. In the ruling dated 18th May 2023, the Court had set out the tenor of the Preliminary Objection in this manner:

> " The 1st respondent is of the view that this court or the Environment and Land Court as established has no jurisdiction to entertain the current petition as presented and should down tools at the earliest because of the Pullman doctrine on judicial abstention."

6. The ruling also captured the prayers sought in the petition as follows:

> " The petitioner filed the petition dated the 18th day of January 2023, premised upon violation of *the Constitution* as highlighted in paragraphs 33-49 of the petition. It has sought various reliefs as follows:

a. A declaration that the actions of the respondents are in violation of Articles 10,11,42,43,60 and 69 of *the Constitution*.

b. A declaration that the actions of the respondents are in violation of Articles 1, 8, and 10 of the Convention on Biological Diversity, Article 22 of the African Charter on Human and People's Rights, and Article 27 of the International Covenant on Civil and Political Rights which Kenya is a signatory to.

c. A declaration that the first respondent's actions violate Sections 50, 51, and 53 of the Environmental Management and Coordination Act 1999.

d. An order for compensation to the affected community in Kilifi County against the respondents for violation of constitutional rights.

e. A conservatory order to be issued against the respondents to stop and discontinue actions of allowing the uprooting and exportation of baobab trees, as it is harmful to the environment.

f. An order to compel the Respondents to restore the trees uprooted by Ariba Seaweed International Limited in their natural environment.

g. An order to compel the respondents to engage and educate the public in the affected areas of the importance of conservation of the Baobab trees.

h. An order that this being a public interest case, there be no orders as to costs.

i. Any other relief the court shall deem fit to grant."

7. The Court extensively reviewed and discussed the doctrine of exhaustion and abstention as seen from the prism of the Superior Courts and particularly guidance on the issue from the Supreme Court and arrived at the following decision:

> " The Kibos doctrine is then to the effect that where a claim in a petition or suit is multifaceted as the one we have here, the best approach to take is to reserve the constitutional issues to await the determination of the primary adjudicative authority, in this case, it has been brought to the court's attention that there is active litigation on the issuance of license on the 8 baobab trees in NET 45 of 2022 Omar Salim Mwakweli and Others V NEMA and Georgy Gvasaliya, of course, I agree with the petitioners that this issue has been raised at the submission level and should be frowned upon. But then, as held by the apex Court in the Kibos Case (supra) the best approach to take is to refer the matter to the relevant adjudicative organ. In this case, I ought to have referred the matter to NET. It has been brought to my attention that such a suit already exists, and I need not make a referral. Let that claim run its full course. I therefore down tools on the dominant issue of licencing.

8. In her affidavit dated 4th October 2023, Dr. Annette Mbogoh, the petitioner's Executive Director, contends that this matter and the issues raised in the petition continue to elicit public discourse on preserving the baobab tree. She avers that the National Environment Tribunal (NET)has no jurisdiction to address the constitutional issues raised in the petition and that the NET is not adequately constituted to address the issue reserved for it.

9. She further states that the petition was brought to have protection and conservation measures issued by this Court towards all the baobab trees since the tree may be extinct given the recent threats posed by the recent extraction and translocation. This Court should allow the amendment of the petition, with

the eight baobab trees in issue having been exported on or about August 2023, and the main petition should proceed to full trial.

10. The respondents think the petitioner seeks a second bite at the cherry, and nothing has changed to warrant a review. Ms. Lutta, for the 2nd, 4th, 5th, and 6th respondents, filed grounds in opposition, stating that the Court rendered itself through its ruling dated 18th May 2023. The same issue is being raised in the current application. It became functus officio, so to say, the moment it reserved the licensing issue to the NET. The Kibos decision is still binding on this Court on the doctrine of exhaustion, and NET should be allowed to finalize the case pending before it on the licensing of the eight baobab trees for exportation.

11. Mr. Faraj. for the 3rd respondent, is of the same view that the Court has no jurisdiction to re-hear this matter, which is well-seized and within the purview of NET. He is also of the view that there is nothing new to warrant the orders for review.

12. Mr. Faraj referred this Court to the decisions in National Bank of Kenya v Ndungu Njau [1997] eKLR and Shanzu Investment Limited v Commissioner for Land [1993] eKLR on the factors to consider before a review is granted, which are that an error has been detected in the initial orders, a piece of new and vital evidence or material has been discovered which could not have been diligently reckoned at the beginning, and any other sufficient reason(s) which should be considered hence a need for review.

13. Mr. Faraj also referred this Court to the decision in Raila Odinga & others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR, that this Court cannot revisit what it has already decided on.

14. Mr. Mulekyo has referred this Court to several authorities on the subject of review, which this Court should consider in arriving at its decision. See Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR on the need for Courts to inspire public confidence when rendering decisions and to avoid deciding cases based on technicalities and not substance as among factors to consider when exercising jurisdiction on review.

15. Review is provided in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

16. Section 80 of the *Civil Procedure Act* provides as follows:

> " Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or(b)by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

17. Order 45 of the Civil Procedure Rules provides as follows:

> " 1.
>
> (1) Any person considering himself aggrieved—
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> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

18. Courts have the discretion to allow review on three grounds: where there is the discovery of a new and vital matter of evidence, where there is an apparent error on the face of the record which needs rectification, and where there is sufficient reason to do so. The application for review must be made without undue delay. The third reason for review on sufficient reason(s) has been held not to be exhaustive. Those reasons can be deciphered on a case-to-case basis; see Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR:

> " To the statutory grounds, may also be added instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see Serengeti Road Services -v- CRBD Bank Limited [2011] 2 EA 395. Also, to be included as part of sufficient reason is where the impugned order, if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: see Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (supra).
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> 37. It is practically impossible to itemize what would be 'sufficient reason' for purposes of review under the courts' ''residual jurisdiction'' or inherent powers. The exceptional instances when obvious injustice would be worked by a strict adherence to the terms of the order or decree as originally passed are copious.
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> 38. However, given that a review application is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited, 'sufficient reason' ought to include, in my view, the statutory grounds for review as outlined in the Civil Procedure Rules. That ought to be the starting point and a fine guideline."

19. The Court has considered the materials and authorities provided by the parties in this application, and those supplied leading to the ruling now sought to be reviewed. On the ever-emerging jurisprudence on the doctrine of exhaustion, based on my consideration and having taken judicial notice that the

Supreme Court has recently – 28th December 2023 (well after my ruling dated 18th May 2023) in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023*) [2023] KESC 113 (KLR) (28 December 2023) (Judgment), has provided significant guidance on as follows:

> " Looking at all the above issues in perspective, we must start by giving due consideration to the provisions of Article 70(1) of *the Constitution* which provides for the locus standi in the enforcement of environmental rights by way of a constitutional petition. It provides that:
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> > "If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being, or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter."
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> (118) It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC, and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under EMCA, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations, as is the case in the present dispute. The fact that licenses may well be a part of the appellant's petition does not in any way outlaw the hearing and determination of it by ELC.
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> (119) Similarly, in respect of the *Energy Act*, Section 106 of the Act provides that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing, while Section 25 generally grants jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal's attention.
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> [120] In addition to the above findings, since the appellant's claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC which would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts therefore clearly fell into error by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so because though the claims against the 2nd and 3rd respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals.
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> (121) We must hasten to add that, it is the 2nd and 3rd respondents alleged unabated mining activities on L.R. No. Siaya/Ramba/716 that led them to dump waste or effluent onto the appellant's property namely L.R No. Siaya/Ramba/719 and 720. While

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

> "[51] Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination if there would be other appropriate legislatively mandated institutions and mechanism.
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> [52] The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the

federal court, even if the State Court makes a ruling on the issue.

[53] Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of *the Constitution* was protected."

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

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

(124) The Court of Appeal in our view, in making the findings it did above fell into error because, as we held earlier in this judgment, there was nothing that barred the appellant from filing an appeal against the decision of the trial court once his petition was struck out. The appellant had two options available to him; appeal the decision or file a new claim. The appellant chose the latter and we have found that his chosen path was the correct one. Such a finding is also well within the confines of our decision in Benson Ambuti Case (supra) and ensures that a party's right to a fair hearing under Article 50 of *the Constitution* is protected.

(125) In concluding on this issue, it is our finding that it is upon a party to frame its pleadings as it deems fit but in doing so should not create such a disjointed case that a court has to struggle in the identification of each facet thereof. Elegant pleadings also ensure that the responding party has a clear case to answer to. A court on its part, must not descend to the arena of litigation but instead

> determine all contested matters judicially and in a multifaceted claim, address each issue within its jurisdiction including remitting parts of the claim to the relevant statutory body while retaining what is properly before it. In the present case and for reasons given above, the issues raised were well within the ELC's jurisdiction to determine and there was no reason to either reserve or remit any of them and we so hold."

20. That decision's implications will mean a new shift in how we address the issue of exhaustion; it must be done on a case-to-case basis to avoid parties suffering when the primary adjudicative forum seems ineffective and inefficacious.

21. As discussed above, the current petition was multifaceted. The issue of a license for translocating the eight baobab trees to Georgia was predominant. A pending matter was before NET (the primary adjudicative forum) - NET 45 of 2022 Omar Salim Mwakweli and Others v NEMA and Georgy Gvasaliya. This Court was persuaded to stay the constitutional issues raised until the matter before NET was adjudicated. I have not been told what transpired before NET or whether the matter filed there was determined. But I have been told that the eight baobab trees were shipped to Georgia, which radically shifts the petition's substratum.

22. The earlier directions were that we would await NET's decision. Because the trees have been shipped out of the Country, whether by the license earlier issued by the relevant authorities or other decisions or directions issued by any other agencies, there is nothing to bar this Court from proceeding with the constitutional issues raised in the pending petition.

23. In any event, the Supreme Court has now given a fresh perspective on how to deal with the doctrine of exhaustion to avoid undue hardships occasioned by parties when dealing with multifaceted matters. Had this guidance come earlier, the 18th May 2023 decision would have been different. The Constitutional issues raised herein regarding the need to address the protection of the baobab tree still stand. The extraction, translocation, and exportation of the baobab tree is a matter of significant public interest for environmentalists and the Government and will continue to be so. The hitherto unknown benefits of the tree once feared as a bad omen by the Kilifi residents, have now been revealed, as the petitioner's suit papers suggest. The future and survival of this tree, standing tall in its natural state in Kilifi County and the Country at large, will remain under intense scrutiny in the present and the near future, particularly in this era of climate change. The constitutional violation claims in this petition will also be of great concern. In my view and in the spirit of environmental conservation efforts, the petition will go to full trial.

24. We will no longer wait for the decision on licensing the eight baobab trees by NET for translocation abroad. We will proceed with the constitutional issues raised in the petition without further delay. In my view, there was no need to bring the review application. Given the development regarding the eight baobab trees, the Court should have been moved to direct how to proceed with the petition - just that.

25. Application dated 19th June 2023 is hereby allowed to the extent that:

> This Court, at this moment, directs that the current petition proceeds to a full hearing before this Court to hear the constitutional issues raised by the petitioner without further delay. Costs in the cause."

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 9TH DAY OF MAY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mulekyo for the Petitioner.

Mr. Gitonga for 1st Respondent

Court Clerk: Happy

In the Absence of: -

Ms. Lutta for the 2nd, 4th, 5th and 6th Respondents

Mr. Nyale for the 3rd Respondent