



Obuli & 2 others v National Environment Management Authority & 3 others (Environment & Land Petition E018 of 2024) [2025] KEELC 646 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 646 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E018 OF 2024
AA OMOLLO, J
FEBRUARY 20, 2025**

BETWEEN

**NAMENYA OBULI 1ST PETITIONER
NYONGESA NAMUDE 2ND PETITIONER
ODHIAMBO AKUDE JURA 3RD PETITIONER**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT
THE COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT
KENYA POWER & LIGHTING COMPANY 3RD RESPONDENT
KENYA RURAL ROADS AUTHORITY 4TH RESPONDENT**

RULING

1. The 3rd Respondent filed a notice of preliminary objection dated 11th October 2024 on the grounds that this Honourable Court lacks jurisdiction to hear and determine this suit as against the 3rd Respondent and should be struck out with costs as the same offends the provisions of sections 3(1), 10; 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42 and 224(2)(e) of the *Energy Act*, 2019 together with Regulations 2, 4, 7, and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with Article 159(2)(c) and 169 (1)(d) and (2) of *the Constitution* of Kenya, 2010 and sections 9(2) and (3) of the *Fair Administrative Action Act*, 2015.

Submissions

2. In support of its Preliminary Objection, the 3rd Respondent filed submissions dated 13th November 2024 and in opposition, the Petitioners filed submissions dated 19th November 2024. In the preface of



the submissions, the 3rd Respondent stated that the Court of Appeal has consistently emphasized the necessity of courts adhering strictly to their jurisdiction and has cautioned litigants against bypassing established dispute resolution mechanisms.

3. In support they cited the Court of Appeal in Kisumu in Civil Appeal No. 42 of 2021, Abidha Nicholus vs. Attorney General & 7 others. National Environmental Complaints Committee (NEEC) & 5 others (Interested Parties) (unreported) reaffirming that disputes relating to energy matters, including billing, damages, disconnection, and wayleaves, should follow the three-tier dispute resolution mechanism set out under the *Energy Act*, 2019. First, through the Energy and Petroleum Regulatory Authority (EPRA); second, through the Energy and Petroleum Tribunal (EPT); and only after exhausting these avenues, it moves to the the High Court.
4. Additionally, the doctrine of exhaustion, rooted in Article 159(2)(c) of *the Constitution*, mandates that alternative dispute resolution mechanisms be utilized before judicial intervention. The 3rd Respondent argues that the present case concerns wayleaves and easements related to the distribution and supply of electrical energy, a matter expressly placed under the jurisdiction of the Energy and Petroleum Tribunal.
5. With regard to jurisdiction, they submitted that it is a fundamental issue that must be determined at the earliest opportunity and in support cited the case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1, where it was held that a court without jurisdiction must "down its tools" and cease further proceedings.
6. With regard to Alternative Dispute Resolution (ADR) Mechanisms, the 3rd Respondent submitted that Article 159(2)(c) of *the Constitution* emphasizes ADR mechanisms such as mediation and arbitration. That the *Energy Act*, 2019 establishes the Energy & Petroleum Regulatory Authority (EPRA) and the Energy & Petroleum Tribunal, which are vested with jurisdiction over disputes in the energy sector. Further, Section 36 of the Act grants the Tribunal original and appellate jurisdiction over disputes involving licensees and third parties.
7. That Section 9(2) and (3) of the *Fair Administrative Action Act*, 2015 bars courts from reviewing administrative actions unless all available remedies have been exhausted as was upheld in Republic v. Energy Regulatory Commission & 2 Others [2018] Eklr and Mutanga Tea & Co. Ltd v. Shikara Ltd & Another [2015] Eklr, where the courts stressed that statutory forums ensure disputes are resolved efficiently and cost-effectively by subject-matter experts.
8. The Petitioners present two key issues for determination; whether the Court has jurisdiction and whether the exhaustion doctrine applies. They argue that if the Court lacks jurisdiction, it cannot proceed further but contend that this case concerns environmental rights under *the Constitution* and falls within this Court's jurisdiction rather than the Energy and Petroleum Tribunal.
9. They submitted that the Preliminary Objection (PO), is misguided and unsustainable. In reliance to constitutional provisions, including Articles 22(c), 39, 42, 69, 70, and 72, which empower the Court to adjudicate environmental matters and citing Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors (1969) EA 696, they asserted that a valid PO must raise a pure point of law and should not require fact-finding.
10. They stated that the Petitioners argue that the predominant purpose of the case is environmental protection, not energy regulation and cited Okoiti v Cabinet Secretary Industry Trade and Cooperatives & 2 others (2022) KEELC 3728, which applied the "predominant purpose test" to determine jurisdiction in multifaceted cases.



11. Regarding the exhaustion doctrine, the Petitioners assert that it does not apply, as only this Court has the mandate to enforce the constitutional right to a clean and healthy environment under Section 13(3) of the *Environment and Land Court Act*. They emphasize that the *Energy Act* does not cover environmental obligations or enforcement of environmental rights, thus the 3rd Respondent is misdirected in arguing for the Tribunal's jurisdiction.

Analysis and determination;

12. The PO is that the court lacks jurisdiction and offends the doctrine of exhaustion because the substantive issue concerns wayleaves and easements related to the distribution and supply of electrical energy, a matter expressly placed under the jurisdiction of the Energy and Petroleum Tribunal. Section 36 of the *Energy Act* provides that;

- “(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.”

13. Section 42 of said Act provides thus; “The Tribunal shall have appellate jurisdiction to hear and determine appeals to all disputes arising from decisions of the Authority or licensing authority relating to energy matters and any matter referred to the Authority or any licensing authority.”

14. The jurisdiction of the Energy Tribunal according to the *Energy Act* can only be invoked on appeal against the action (or lack thereof) of the Energy and Petroleum Regulatory Authority as set out in sections 10 and 11. I have read the narration on the background to the Petition as contained in paragraphs 8 to 18 and it does not clear point out that the dumping was undertaken by the 3rd Respondent. Since there other government agencies who are sued that are mandated with regulating the environment, this court may not be in a position through the preliminary objection to ascertain that this was purely a mandate of the 3rd Respondent hence the application of the doctrine of exhaustion.

15. It is noteworthy, that the decision by the Court of Appeal in Court of Appeal in Kisumu in Civil Appeal No. 42 of 2021, Abidha Nicholus vs. Attorney General & 7 others relied on by the 3rd Respondent was reversed by the Supreme court. I the stated case, the Supreme Court comprehensively discussed the jurisdiction of the court vis vi the doctrine of exhaustion inter alia;

- “105. 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.

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).
16. In guidance by the holding in the above case, the test to apply whether the preliminary objection is merited or otherwise to consider whether the alternative remedy would be adequate and whether the Petition as filed raises any allegations of Constitutional violations. On the adequacy of the alternative remedy, as I have stated in paragraph 14 above, it is not clear who dumped the waste complained of and whose mandate between the four (4) Respondents to clean it up. As far as the Petitioners are concerned, their right to clean and healthy environment is being violated. An alternative remedy (doctrine of exhaustion) if adopted may result in to shifting of blames and therefore not adequate.
17. Under paragraph D of the Petition, the Petitioners have enumerated the particulars of the alleged breaches. For instance, it alleged that the 1st Respondent failed to take measures on dumping of waste which has decayed thus threatening human health and a right to a clean and healthy environment. Amongst the reliefs sought is a declaration that the Petitioners' right to a clean and healthy environment and the freedom of movement has been violated by these Respondents.
18. The PO that was filed required of the court to source for evidence from the facts pleaded in support of the Petition which declassifies it from a pure point of law. Be that as it may, it is this court which has primary jurisdiction to hear and determine disputes which involve issues on land and environment. I have also explained why the alternative remedy proposed by the 3rd Respondent will not be adequate.
19. Consequently, I hold that the preliminary objection dated 11th October 2024 brought by the 3rd Respondent is without merit and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH OF FEBRUARY, 2025

A. OMOLLO
JUDGE

