



**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)**

Neutral citation: [2023] KESC 113 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION E007 OF 2023
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
DECEMBER 28, 2023**

BETWEEN

ABIDHA NICHOLUS APPELLANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

JOSEPH ANDEERE NYAANGA 2ND RESPONDENT

OWANG ISAAK OGWEYO 3RD RESPONDENT

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

**CABINET SECRETARY MINISTRY OF ENVIRONMENT, CLIMATE CHANGE
AND FORESTRY 5TH RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 6TH
RESPONDENT**

COUNTY COMMISSIONER SIAYA COUNTY 7TH RESPONDENT

KENYA POWER & LIGHTNING CO. LTD 8TH RESPONDENT

AND

**THE NATIONAL ENVIRONMENTAL COMPLAINTS
COMMITTEE INTERESTED PARTY**

COMMISSION OF ADMINISTRATIVE JUSTICE INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY

KITUO CHA SHERIA INTERESTED PARTY

ACACIA EXPLORATION KENYA LTD INTERESTED PARTY



(Being an Appeal from the Judgment of the Court of Appeal at Kisumu (Kiage, Mumbi Ngugi & Tuiyott JJ.A) in Civil Appeal No. E042 of 2021 delivered on 7th February, 2023)

Jurisdiction of the Environment and Land Court to determine disputes involving the management of the environment and issues of petroleum and energy

Reported by Kakai Toili

Jurisdiction – *jurisdiction of the Environment and Land Court (ELC) – jurisdiction to determine disputes involving the management of the environment or issues of petroleum and energy – claim that the Environmental and Management Coordination Act and the Energy Act ousted the jurisdiction of the ELC – whether the ELC had original jurisdiction over disputes involving the management of the environment or issues of petroleum and energy – Constitution of Kenya, 2010, article 162(2)(b); Environment and Land Court Act, (Cap 8D), section 13; Environmental Management Coordination Act, (Cap 387), section 125; Energy Act, (Cap 314), section 36; Fair Administrative Action Act, (Cap 7L), section 9(4).*

Jurisdiction – *jurisdiction of the National Environment Tribunal (NET), the Energy and Petroleum Regulatory Authority (EPRA) and the Energy and Petroleum Tribunal (EPT) - jurisdiction to determine constitutional violations - whether the NET, EPPRA and EPT had the jurisdiction to determine constitutional violations - Constitution of Kenya, 2010, article 162(2)(b); Environment and Land Court Act, (Cap 8D), section 13; Environmental Management Coordination Act, (Cap 387), section 125; Energy Act, (Cap 314), section 36.*

Constitutional Law – *constitutional reliefs – constitutional reliefs in matters where there existed alternative dispute resolution mechanisms - whether the availability of an alternative remedy automatically barred an individual from seeking constitutional relief.*

Jurisdiction – *jurisdiction of the Supreme Court – appellate jurisdiction - what were the factors to consider in invoking the Supreme Court’s appellate jurisdiction as of right in any case involving the interpretation or application of the Constitution – Constitution of Kenya, 2010, article 163(4).*

Civil Practice and Procedure – *pleadings – amendment of pleadings - whether a party could amend pleadings after a preliminary objection had been raised relating to pleadings filed.*

Brief facts

The appellant was aggrieved by the mining activities of the 2nd and 3rd respondents in Ramba and complained to the 6th respondent, National Environment Management Authority (NEMA) to take action. The appellant alleged that the 2nd and 3rd respondents dumped waste and/or effluent from their mining shaft posing health risks. NEMA noted that the 2nd and 3rd respondents were conducting mining activities and had submitted an environmental impact assessment (EIA) report which activity was illegal for want of authorization from NEMA and the 4th respondent, the Ministry of Mining and Petroleum. NEMA proceeded to issue a stop order halting the operations of the 2nd and 3rd respondents.

According to the appellant, the 2nd and 3rd respondents continued with their mining operations. The appellant claimed that the 2nd and 3rd respondents invaded his property and had since proceeded to excavate and mold concretes therein. Additionally, the 2nd and 3rd respondents together with the 8th respondent had trespassed onto his land, dug holes and erected electricity poles thereon without his consent. Aggrieved, the appellant filed a petition at the Environment and Land Court (ELC) claiming violation of various constitutional rights and statutory provisions. The 2nd and 8th respondents filed preliminary objections challenging the jurisdiction of the ELC to determine the petition. The ELC found that the 2nd and 8th respondents’ objections were merited.

The ELC held that as the appellant’s complaint against the 8th respondent, Kenya Power & Lightning Co. Ltd (KPLC) involved the placement of electrical posts on his land, the Energy and Petroleum Regulatory Authority



(EPRA) had the power to entertain the dispute and the court would not assume jurisdiction at the first instance and if dissatisfied by any decision made by EPRA, the appellant could then move to the Energy and Petroleum Tribunal (EPT) for redress on appeal. As regards the preliminary objection raised by the 2nd respondent, the ELC found that the dispute primarily focused on the mining activities and alleged resultant environmental pollution which fell within the jurisdiction of NEMA as it revolved around issuance of licenses and the result of such issuance.

The ELC stated that its jurisdiction in relation to disputes reserved for NEMA and the National Environment Tribunal (NET) was restricted to appeals emanating from the former. Aggrieved by the decision, the appellant filed an appeal with the Court of Appeal, which ruled that nothing, aside from the statute of limitations, prevented the appellant from initiating another suit, excluding issues governed by the Environmental Management Coordination Act and the Energy Act. The Court also affirmed that the ELC's final order was valid, as the ELC had determined it lacked original jurisdiction over certain claims in the multifaceted petition.

Issues

- i. Whether the Environment and Land Court had original jurisdiction over disputes involving the management of the environment and issues of petroleum and energy.
- ii. Whether the National Environment Tribunal, the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal had the jurisdiction to determine constitutional violations.
- iii. Whether the availability of an alternative remedy automatically barred an individual from seeking constitutional relief.
- iv. What were the factors to consider in invoking the Supreme Court's appellate jurisdiction as of right in any case involving the interpretation or application of the Constitution?
- v. Whether a party could amend pleadings once a preliminary objection had been raised in regard to pleadings filed.

Relevant provisions of the Law

Environment and Land Act, Cap 8D

Section 13 - Jurisdiction of the Court

(1) 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.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) 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.

(5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—



- (a) interim or permanent preservation orders including injunctions;
- (b) prerogative orders;
- (c) award of damages;
- (d) compensation;
- (e) specific performance;
- (f) restitution;
- (g) declaration; or
- (h) costs.

Held

1. The appellate jurisdiction of the court was as set out in article 163(4) of the Constitution. As to what constituted a matter involving interpretation and application of the Constitution, a specific provision(s) of the Constitution must have been an issue for interpretation and/or application by both the High Court and courts of equal status as well as the Court of Appeal.
2. A determination about whether an appeal satisfied the criteria for invoking the court's appellate jurisdiction was not governed by rigid principles. Instead, it was a power exercised by the court on a case-by-case basis but within the confines of the Constitution and statute.
3. The issues in the instant case fell squarely within the court's appellate jurisdiction in article 163(4)(a) of the Constitution and called for the court to determine them as a matter of constitutional interpretation and application. The appeal correctly invoked the court's jurisdiction to the extent of determining those questions.
4. The resolution of environmental issues before NEMA had been the subject of prior decisions by the superior courts and two schools of thought had emerged in that regard. On one hand, there was a series of decisions that had taken the position that, even though the ELC had original and appellate jurisdiction on environment and land matters, parties should exhaust the mechanisms provided for under the Environmental Management Coordination Act, by first referring a matter to NET before an appeal could lie to the ELC. There was however another school of thought that had posited that, if the complaints and prayers by a petitioner related to infringement of the constitutional right to a clean and healthy environment or any other constitutional violation, then NET lacked the jurisdiction to determine the constitutional issue hence the provisions of section 129 of the Environmental Management Coordination Act were inapplicable to such claims.
5. Where there was an alternative remedy, especially where Parliament had provided a statutory appeal procedure, then it was only in exceptional circumstances that the court could resort to any other process known to law.
6. Under article 165(1)(c) of the Constitution, the High Court had the jurisdiction to determine whether a right or fundamental freedom outlined in the Bill of Rights had been denied, violated, infringed upon, or was under threat. In that context, article 165(5)(b) imposed limitations on the High Court's jurisdiction concerning matters falling within the purview of the courts specified in article 162(2) of the Constitution. Consequently, article 165(2)(b) mandated the establishment of courts possessing the status of the High Court to *inter alia* and of relevance to the appeal before the court, address issues related to the environment, as well as the utilization and ownership of land with Parliament assuming the responsibility to delineate the functions and jurisdiction of that court as stipulated in article 165(3).
7. The Environment and Land Court's jurisdiction was as provided for in section 13 of the Environment and Land Court Act with section 13(1) specifically outlining 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. The provisions of section 13(2) must be read in contrast to those in the Environmental Management Coordination Act which provided for instances where disputes pertaining to compliance with breach and/or violations of the provisions of EMCA and which disputes ought to be lodged



- with and/or addressed by NET, which was established pursuant to the provisions of section 125 of the Environmental Management Coordination Act. Redress for constitutional violations was not part of that mandate.
8. The Energy Act provided for a dispute resolution mechanism for complaints to be determined by EPRA which was vested with such authority under section 10 of the Act. Should a party be dissatisfied with the decision of EPRA, then he or she had the right to file an appeal before the EPT as provided for under section 36 of the Energy Act. It was only when one was dissatisfied with the decision of the EPT that such a party could appeal the Tribunal's decision to the ELC.
 9. The provisions of the Environmental Management Coordination Act and the Energy Act did not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involved the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still had original jurisdiction over the matters that were handled by NEMA, unless such jurisdiction was specifically and expressly ousted in a constitutionally compliant manner. The same held true for proceedings under the Energy Act.
 10. Section 9(2) of the Fair Administrative Action Act, provided that where there existed internal mechanisms for the resolution of a dispute, the court would not review the administrative action until the internal dispute mechanism had been exhausted. That fact notwithstanding, there was nothing that precluded the adoption of a nuanced approach, that safeguarded a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms could offer. That was also why section 9(4) of the Fair Administrative Action Act created the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.
 11. Neither the NET, EPRA nor EPT had 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 frustrated the enforcement of fundamental rights and freedoms.
 12. The availability of an alternative remedy did not necessarily bar an individual from seeking constitutional relief. That was because the act of seeking constitutional relief was contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy was deemed inadequate in addressing the issue at hand, then the court was not restrained from providing constitutional relief.
 13. There was a need for the court to scrutinize the purpose for which a party was seeking relief, in determining whether the granting of constitutional reliefs was appropriate in the given circumstances. That meant 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, was a necessary prerequisite on the part of any superior court.
 14. Where the reliefs under the alternative mechanism were not adequate or effective, then there was nothing that precluded the adoption of a nuanced approach. What must matter at the end was that a path was chosen that safeguarded a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms could offer. That was because, to achieve a harmonious and effective legal framework, it was 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 required a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism.
 15. It was sufficient that the appellant alleged that a right in the Constitution had been infringed or threatened with violation, making it clear that in light of the provisions of the Constitution and the Environment and Land Court Act, the issues raised were within the original jurisdiction of the ELC. That was also why section 3 of the Environmental Management Coordination Act provided that, one



- of the general principles under the Act was the entitlement to a clean and healthy environment. Section 3(3) of the Environmental Management Coordination Act was even more instructive as it granted any person, who claimed that their right to a clean and healthy environment had been violated, the right to apply to the ELC for redress.
16. There was nothing that barred the appellant from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the Energy Act. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify.
 17. A party could not move to amend pleadings once a preliminary objection had been raised in regard to pleadings filed to confer jurisdiction. Preliminary objections were raised because, upon determination, the outcome would have a major bearing on the status of a claim, as the preliminary objection raised a pure point of law which if successful, would dispose of the petition as it did in the instant case.
 18. Article 70(1) of the Constitution provided for the *locus standi* in the enforcement of environmental rights by way of a constitutional petition. Article 70(1) generously allocated the appellant the right to file his constitutional petition before the ELC and from the orders that the appellant had set out in his constitutional petition, the remedies of appealing to NEMA and EPRA, respectively, were not efficacious and adequate. Section 129 of the Environmental Management Coordination Act provided for matters that may require determination by NET. They were all related to licenses and not constitutional violations as was the case in the instant dispute. The fact that licenses may well be a part of the appellant's petition did not in any way outlaw the hearing and determination of it by ELC.
 19. Section 106 of the Energy Act provided that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing while section 25 of the Act generally granted 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 could not be such issues as to attract the Tribunal's attention.
 20. Since the appellant's claim was 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 erred 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. That was because though the claims against the 2nd and 3rd respondents were intertwined and arose 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.
 21. It was the 2nd and 3rd respondents alleged unabated mining activities on the suit property that led them to dump waste or effluent onto the appellant's property. While conducting those 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. Those matters were contested in the context of the claims of constitutional violations and only the ELC could properly hear and determine them.
 22. It was upon a party to frame its pleadings as it deemed fit but in doing so should not create such a disjointed case that a court had to struggle in the identification of each facet thereof. Elegant pleadings also ensured that the responding party had 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 was properly before it. In the instant case, 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.



23. The petition filed before the ELC should be determined on its merits with respect to 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, which created a legitimate expectation that his concerns would be addressed.

Appeal allowed.

Orders

- i. *The petition of appeal dated March 16, 2023 and lodged on March 20, 2023 was allowed and the judgment of the Court of Appeal dated February 7, 2023 was set aside in entirety as was the ruling of the ELC dated February 2, 2021.*
- ii. *The matter was remitted to the ELC at Kisumu for hearing and determination by any judge other than Ombwayo, J on the alleged constitutional violations highlighted and in conformity with the instant judgment.*
- iii. *In view of the time taken in determining the issues raised by the appellant, the court directed that the hearing before the ELC shall be conducted expeditiously and on a priority basis.*
- iv. *Each party shall bear its costs at the ELC, Court of Appeal and the instant court.*
- v. *The court directed that the sum of Kshs 6,000 deposited as security for costs in the appeal therein be refunded to the appellant.*

Citations

Cases

Kenya

1. *Kiragu, Ananias N v Eric Mugambi, Franklin Mwirigi & Martin Njeru* Civil Appeal 59 of 2016; [2019] KECA 911 (KLR) - (Mentioned)
2. *Borbor & 2 others v National Environment Management Authority* Environment and Land Judicial Review Case 2 of 2022; [2022] KEELC 3947 (KLR) - (Mentioned)
3. *Busia Sugar Industries Limited v West Kenya Sugar Limited, Tejveer Singh Rai & Jaswant Singh Rai* Judicial Review 4 of 2016; [2018] KEHC 2622 (KLR) - (Mentioned)
4. *Cortec Mining Kenya Limited v Cabinet Secretary, Ministry Of Mining & Attorney General* Miscellaneous Application 298 of 2013; [2013] KEHC 6504 (KLR) - (Mentioned)
5. *Eaton Towers Kenya Limited v Kasing'a & 5 others* Civil Appeal 49 of 2016; [2022] KECA 861 (KLR) - (Mentioned)
6. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Mentioned)
7. *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* Petition 64 of 2013; [2024] KEHC 6648 (KLR) - (Mentioned)
8. *Ken Kasinga v Daniel Kiplagat Kirui, National Environment Management Authority, Eaton Towers Kenya Ltd, Communications Commission of Kenya, Nakuru County Government & Peman Consultants Limited* Petition 50 of 2013; [2014] KEHC 4427 (KLR) - (Mentioned)
9. *Kenya Breweries Limited v Lawrence Ndotu & 6000 Others* Civil Application 283 of 2013; [2014] KECA 212 (KLR) - (Mentioned)
10. *Kenya Revenue Authority, Commissioner of Customs Services & Julius Musyoki v Darasa Investments Limited* Civil Appeal 24 of 2018; [2018] KECA 358 (KLR) - (Mentioned)
11. *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* Civil Appeal 153 of 2019; [2020] KECA 875 (KLR) - (Mentioned)
12. *Kimani & 2 others v Kenya Airports Authority & 3 others* Petition 11 of 2019; [2021] KESC 43 (KLR) - (Mentioned)
13. *Macharia, Samuel Kamau & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR - (Mentioned)



14. *Muslims for Human Rights v Attorney General & 2 others* Petition E168 of 2018; [2022] KEHC 12775 (KLR) - (Mentioned)
15. *National Cereals & Produce Board v Erad Suppliers & General Contracts Limited* Civil Appeal 9 of 2012; [2014] KECA 473 (KLR) - (Mentioned)
16. *National Environmental Tribunal v Overlook Management Limited, Silver Sand Camping Site Limited, National Environmental Management Authority, Malindi Green Town Movement, Malindi South Residents Association & Sycamore Investment Limited* Civil Appeal 9 of 2011; [2019] KECA 1005 (KLR) - (Mentioned)
17. *Ngugi v Commissioner of Lands; Owindo & 63 others (Interested Parties)* Petition 9 of 2019; [2023] KESC 20 (KLR) - (Mentioned)
18. *Okoti & 2 others v Attorney General & 14 others* Petition 2 (E002) of 2021; [2023] KESC 13 (KLR) - (Mentioned)
19. *Orata International Limited v National Environment Management Authority* Miscellaneous Civil Application 21 of 2019; [2019] KEELC 2599 (KLR) - (Mentioned)
20. *Peter Oduor Ngoge vs Francis Ole Kaparo & 5 Others* Petition 2 of 2012; [2012] KESC 7 (KLR)
21. *R v National Environment Management Authority Kilifi County & National Environment Management Authority* Environment & Land Case 196 of 2018; [2020] KEELC 3010 (KLR) - (Mentioned)
22. *Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* Petition 4 of 2012: [2014] eKLR - (Mentioned)
23. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated) - (Explained)
24. *Republic v Kenya Revenue Authority Ex Parte Style Industries Limited* Miscellaneous Application 45 of 2019; [2019] KEHC 11965 (KLR) - (Mentioned)
25. *Suleiman Said Shabbal v Independent Electoral & Boundaries Commission (IEBC), Mwadime Mwashigadi & Hassan Ali Jobo* Election Petition 8 of 2013; [2013] KEHC 3488 (KLR) - (Mentioned)

India

United Bank of India v Satyawati Tondon & Others (2010) 8 SCC 110 - (Mentioned)

United States

1. *England v Louisiana State Board of Medical Examiners* 375 US 411 (1964) - (Mentioned)
2. *Railroad Commission of Texas v Pullman Co* 312 US 496; 61 S Ct 643, 85 L Ed 971 (1941) - (Mentioned)

Regional Court

Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 10, 27 (1); 28; 35(1); 42; 43; 47; 69(1); 73; 75; 163(4) - (Interpreted)
2. Energy (Complaints and Dispute Resolution) Regulations, 2012 (cap 314 Sub Leg) regulations 4, 7- (Interpreted)
3. Energy Act (cap 314) sections 3(1); 10; 11(e) (f)(i)(k)(l); 23; 24; 36; 40; 42; 224(2)(e) - (Interpreted)
4. Environment and Land Court Act (cap 8D) section 13(1)(2) - (Interpreted)
5. Environmental Management and Co-Ordination Act (cap 387) sections 3, 118, 129 (1)(2)(3)(4); 130 - (Interpreted)
6. Fair Administrative Action Act (cap 7L) sections 2, 9(2)(3)- (Interpreted)
7. Mining Act (cap 306) In general - (Cited)
8. Physical and Land Use Planning Act (cap 303) sections 15, 19, 38- (Interpreted)



Advocates

Attorney General for for the 1st, 4th, 5th and 7th respondents

Bruce Odeny & Company Advocates for for the 2nd respondent

Odongo Okal and Company Advocates for for the 3rd respondent

Ms Sakami for for the 6th respondent (National Environment and Management Authority)

Mr Ngara (S Ngara & Associates Law) for for the 8th respondent

Ms Emily Kinama (c/o Katiba Institute) for for the 3rd interested party

JUDGMENT

A. Introduction

1. The Petition of Appeal dated March 16, 2023 and lodged on March 20, 2023 is brought pursuant to the provisions of article 163(4)(a) of the *Constitution*. The appellant seeks orders to set aside the Judgment of the Court of Appeal at Kisumu (Kiage, Mumbi Ngugi & Tuiyott, JJ A) in Civil Appeal No E042 of 2021 delivered on February 7, 2023, which affirmed the decision - a Ruling-by the Environment and Land Court (ELC) at Kisumu (Ombwayo, J) - in ELC Petition No 7 of 2020 delivered on 2nd February 2021.

B. Background

2. Abidha Nicholus, the appellant, is the registered proprietor of LR No Siaya/Ramba/788 and also has interest in the lower parts of LR No Siaya/Ramba/719 and 720, both bordering River Odundu, Ramba in Rarieda Sub-County within Siaya County. The appellant claims that in 2018, the 2nd and 3rd respondents proceeded to survey LR No Siaya/Ramba/716, which contained a shaft left by entities that had previously engaged in mining activities between 1988 and 2008 in the Ramba area. After the survey, in 2019, the 2nd and 3rd respondents commenced mining operations in the area including on LR No Siaya/Ramba/716.
3. The appellant further claims that, he and other concerned parties questioned Joseph Andeere Nyaanga and Owang Isaak Ogweyo, the 2nd and 3rd respondents', respectively, on the licenses/permits or authorizations issued for the mining activities. Their concerns were allegedly ignored by the 2nd and 3rd respondents.
4. Appalled by the non-response to their concerns, on April 9, 2019, the appellant on his behalf and also on behalf of members of Ramba Community, while invoking the provisions of article 35(1) of the *Constitution*, and with the intention to conserve the environment, wrote to officers of the Ministry of Petroleum and Mining, Ministry of Environment and Forestry and National Environmental Management Authority (NEMA), the 4th, 5th and 6th respondents, requesting information about the mining activities that were being carried out in the Ramba area. The 4th and 5th respondents did not respond to the letter and also failed to give any explanation as to why they so declined.
5. Undeterred, on July 23, 2019, the appellant wrote to the Ombudsman/Commission on Administrative Justice (CAJ), the 2nd interested party, seeking its intervention in highlighting the appellant's grievance by reporting the 4th, 5th and 6th respondents' failure to respond to his letter, or even giving explanation for such failure. The appellant's letter prompted CAJ to write to the 4th, 5th and 6th respondents demanding an explanation on the issues raised in the letter dated July 23, 2019.



6. The action by CAJ provoked NEMA to respond through a letter dated 26th August 2019 whereby it confirmed that the 2nd and 3rd respondents were indeed conducting mining activities in Ramba and had submitted an Environmental Impact Assessment (EIA) Report for an existing small-scale artisanal gold mine at San-Martin, Ramba, specifically on LR No Siaya/Ramba/711, which activity was illegal for want of authorization from NEMA and that of the 4th respondent, the Ministry of Mining and Petroleum. NEMA further confirmed that Environmental Impact Assessment (EIA) Report No NEMA/PR/5/2/22027 had not been approved and proceeded to issue a stop order halting the operations of the 2nd and 3rd respondents effective July 31, 2019.
7. The stop orders notwithstanding, according to the appellant, the 2nd and 3rd respondents continued with their mining operations. In or around June 2020, the appellant claims that he received information that the 4th respondent had renewed prospecting license No PL/2019/0226 covering Ramba Area for an entity known as AfriOre International (Barbados) Ltd, which license was later transferred to Acacia Exploration Kenya Limited. NEMA then issued Environmental Impact License No NEMA/EIA/PSL/9290 over the same area, to another entity not related to the 2nd and 3rd respondents. The appellant proceeded to inquire from Acacia Exploration Kenya Limited on whether the activities it was carrying out were connected to the 2nd and 3rd respondents. Acacia Exploration Kenya Ltd denied any connection with the 2nd and 3rd respondents.
8. Consequently, on July 2, 2020, the appellant again wrote to the 1st, 5th, 6th and 7th respondents informing them about the irregular mining activities by the 2nd and 3rd respondents and also raised other issues, namely; the need to identify the investors in the mining activities; public participation prior thereto, if any; lack of licenses/permits or approvals from the 4th and 5th respondents; insecurity and health issues; child labour and non-compliance with labour laws; demarcation of public utilities; environmental impact assessment; environmental degradation/pollution to land, air, water, and associated flora and fauna-as well as the human environment; individual health and safety, local community lifestyles, cultural survival, social order and economic wellbeing; disposal of wastes and effluent in the nearby river; the benefits from the royalty which the local community is entitled to under the *Mining Act*; and post mining rehabilitation planning. Even after raising all these issues, the appellant's letter was not responded to.
9. The appellant furthermore claims that the 1st, 4th, 5th and 6th respondents have continued to issue licenses since 1988 for mineral rights in Ramba area thereby causing harm and loss to residents of the area.
10. The appellant also claims that the 2nd and 3rd respondents invaded his property, LR No Siaya/Ramba/788 and have since proceeded to excavate and mold concretes therein. Additionally, the 2nd and 3rd respondents together with the 8th respondent have trespassed onto the land, dug holes and erected electricity poles thereon, without the appellant's consent.
11. The appellant adds that the 2nd and 3rd respondents have continued to dump waste and/or effluent from their mining shaft on LR No Siaya/Ramba/788 as well as LR Nos Siaya/Ramba/719 and 720 posing health risks. Further, that the 2nd and 3rd respondents positioned their agents and workers to process ore/ and or gold into the nearby parcels of land which overflow into the subject land and also drain into the river without taking any safety precautions or measures. And that the excavation, molding of concretes, installation of structures by the 2nd and 3rd respondents and erection of electricity poles by the 8th respondent are acts of trespass.



12. The appellant lastly avers that the 1st, 4th, 5th, 6th, 7th respondents and 8th respondents, by their acts, deprived him and other members of Ramba area of equal enjoyment and protection of the law by allowing unlicensed/unpermitted mining activities and wanton destruction of the environment.

C. Litigation History

i. Proceedings at the Environment and Land Court (ELC)

13. The appellant, aggrieved by the mining activities aforesaid, filed before the Environment and Land Court Kisumu Petition No 7 of 2020 where he claimed violation of various constitutional rights and statutory provisions under articles 10, 27(1), 28, 35(1), 42, 43, 47, 69(1), 73 and 75 of the Constitution and sought various declaratory orders as well as judicial review orders against the respondents to that effect.
14. The various reliefs sought are reproduced verbatim hereunder as they are central to this appeal. They are:
- (i) A declaration that the 1st to 7th respondents have jointly and severally violated and continue to violate the rights and fundamental freedoms of the appellant and the Ramba Community contrary to articles 10, 27(1), 28, 35(1), 42, 43, 47, 69(1), 73 and 75 of the Constitution.
 - (ii) A declaration that the appellant's right to property has been violated by the 2nd, 3rd and 8th respondents.
 - (iii) 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.
 - (iv) 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, Environmental Management Coordination Act (EMCA), Mining Act, Fair Administrative Actions Act, Access to Information Act and all international treaties and conventions as far as mining activities in Ramba Area is concerned.
 - (v) 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.
 - (vi) 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.
 - (vii) An order of prohibition prohibiting the 4th, 5th and 6th respondents from supporting, supervising and/or issuing any license or permit for mineral rights in Ramba Area without public participation and in blatant violation of the Constitution, Mining Act and EMCA.
 - (viii) 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 appellant, 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 appellant's rights to life, property and clean and healthy environment as protected under articles 40 and 42 of the Constitution.
 - (ix) 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 at least to 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.

- (x) An order that the 2nd, 3rd and 8th respondent do pay damages for trespass and/or infringement of the appellant's right to property known as LR Ramba/No 788 in Rarieda Sub County.
 - (xi) An order for 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 appellant 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.
 - (xii) An order that costs of this petition be borne by the respondents.
 - (xiii) Any other relief that this Honorable Court may deem fit to issue for the interest of justice.
15. Two separate preliminary objections were filed by the 2nd and 8th respondents challenging the jurisdiction of the ELC to hear and determine the petition. The first preliminary objection was raised by the 2nd respondent, where he claimed that the portions of the appellant's claim dealing with the environment were within the mandate of the National Environment Tribunal (NET) as provided for under section 129(1),(2),(3) & (4) of the EMCA and should therefore be determined by NET.
16. The second preliminary objection, by 8th respondent, challenged the jurisdiction of the ELC on the grounds that the petition offended the provisions of sections 3(1), 10, 11(e)(f)(i)(k) and (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 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 Act, 2015.
17. The appellant opposed the objections. As regards the 2nd respondent's objection, he contended that because article 162(b) of the Constitution gives the ELC jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to land, it is therefore mandated, under articles 23(1) and 70 of the Constitution, to give a legal remedy in case of breaches of the right to a clean and healthy environment recognized and protected under article 42 of the Constitution.
18. As for the 8th respondent's objection, the appellant argued that the primary violation attributed to the 8th respondent was the infringement of his right to property contrary to article 40 of the Constitution as well as sections 46, 47 and 48 of the Energy Act. He thus claimed that, article 162(2)(b) of the Constitution gives the court jurisdiction because his claim touched on enforcement of rights and freedoms under the Constitution.
19. Upon considering the two preliminary objections, the trial court (Ombwayo, J) in a Ruling dated 2nd February 2021, found that the 2nd and 8th respondents' objections were merited. By first addressing the 8th respondent's objection, the ELC held that the appellant's complaint against the 8th respondent



was in respect of way leaves, easements or rights of way in relation to the distribution and supply of electrical energy. The learned trial court judge reasoned that, since the appellant's grievance involved the placement of electrical posts on his land by the 8th respondent, the Energy and Petroleum Regulatory Authority (EPRA) has the power to entertain the dispute and the court would not assume jurisdiction at the first instance. And if dissatisfied by any decision made by the Authority, the appellant could then move to the Energy and Petroleum Tribunal (EPT) for redress on appeal. Additionally, the trial court found that section 9(2) and (3) of the *Fair Administration Act, 2015*, transfers jurisdiction for such disputes from the ELC and places jurisdiction on the EPT initially. Consequently, the trial court struck out the petition against the 8th respondent for the reason that there existed an alternative mechanism for resolving the dispute.

20. As regards the preliminary objection raised by the 2nd respondent, the trial court found that the dispute before the court primarily focused on the mining activities of the 2nd and 3rd respondents in the Ramba area, which involved gold processing and alleged resultant environmental pollution. The trial court found that this issue falls within the jurisdiction of NEMA as it revolves around issuance of licenses and the result of such issuance. While acknowledging the trial court's jurisdiction, under articles 22, 162(2) (b) of the *Constitution* and section 13(1) (2) of the *ELC Act*, to hear and determine environmental disputes including those related to land use, occupation of, and title to land, the trial court clarified that its jurisdiction in relation to disputes reserved for NEMA and the NET is restricted to appeals emanating from the former. Consequently, the trial court concluded that the appellant had not exhausted the available remedies set out in *EMCA* before filing his petition. The 2nd respondent's preliminary objection was thus upheld, leading to the striking out of the appellant's petition for want of jurisdiction.

ii. Proceedings at the Court of Appeal

21. Aggrieved by the decision of the ELC, the appellant filed an appeal, Kisumu Civil Appeal No. 42 of 2021, challenging the ELC's decision on thirteen (13) grounds. By consensus of the parties, the grounds were condensed to the following: whether the court's determination was sua sponte and without reasons; whether the court ignored the issues raised in the petition; whether the court erred in finding that it lacked jurisdiction regarding the 2nd respondent's preliminary objection; and whether the court erred in abstaining from considering issues raised against the 8th respondent.
22. In a judgment delivered on February 3, 2023 penned by Tuiyott JA (Kiage and Mumbi Ngugi JJA concurring) the Court of Appeal identified four issues for 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*? and
 - (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?
23. On the issue as to whether the appellant exhausted the dispute resolution mechanism provided by *EMCA* in respect of his complaints regarding the right to a clean and healthy environment, the Court



- of Appeal was of the same view as the ELC's finding that, at the heart of the appellant's complaint against NEMA was that NEMA failed to enforce the stop order it had issued against the 1st and 2nd respondents. The appellate court also observed that, by dint of section 9(1) of EMCA, NEMA plays an important role of exercising general supervision and co-ordination over all matters relating to the environment and is the principal implementor of government policies relating to the environment.
24. It was the appellate court's other finding that, by dint of Section 118 of *EMCA*, NEMA grants powers to an environmental inspector to prosecute an offender by instituting and undertaking criminal proceedings where it is alleged that offences listed under the Act have been committed. Consequently, NEMA, through an environmental inspector, should have instituted and undertaken criminal proceedings against the 2nd and 3rd respondents should they have failed to comply with the stop order. In addition, the appellate court observed that, having failed to make the decision to do so, NEMA would be failing in its duty and its inaction and dereliction of duty could be a proper subject of proceedings by the appellant against NEMA. The appellate court further found that in so far as the appellant faulted the decision by NEMA in regard to the issuance of licenses and permits to the miners, those issues fell squarely within the jurisdiction of NET, and upheld the ELC's finding on the same. The appellate court furthermore clarified that it is only when there is a decision not to enforce a stop order that such a decision would fall within the contemplation of section 129(2) of *EMCA* afore stated.
25. With regard to whether the complaints against KPLC were resolvable in the first instance, under the dispute resolution mechanism provided under the *Energy Act* and whether the appellant ought to have exhausted that mechanism, the Court of Appeal affirmed the trial court's analysis of Section 3 of the *Energy Act* and its finding that the said Act prevails over any other Act of Parliament or law with regard to disputes over energy and petroleum but not over the *Constitution*. The appellate court, while acknowledging the appellant's grievance against KPLC for allegedly trespassing on his property and unlawfully digging holes and erecting power lines on it, stated that there exists a three-tiered mechanism as a dispute resolution mechanism under the *Energy Act*. The first tier involves the raising of a complaint with EPRA under regulations 4 and 7 of the *Energy (Complaints and Dispute Resolution) Regulations, 2012* and in that regard, since the complaint by the appellant against KPLC relates to a way leave for transmission of electricity, then the first forum for the resolution of that dispute should have been EPRA.
26. The Court of Appeal further observed that, should a party be dissatisfied with EPRA's decision, then such a party can follow the second process which is a right of appeal to the EPT whose jurisdiction is provided under section 36 of the *Energy Act*. And that it is only upon exhaustion of the appellate process before the Tribunal that an aggrieved party can further escalate the matter to the High Court, which is the third tier and as provided for under section 37(3) of the *Energy Act*. Thus, in affirming the trial court's finding, the Court of Appeal reasoned that, the appellant did not demonstrate that he would not have obtained efficacious relief had he taken the route envisaged in the *Energy Act* and the ELC was correct in declining jurisdiction in respect of the grievances against KPLC.
27. Additionally, the Court of Appeal acknowledged that, even after determining that the disputes against NEMA and KPLC needed to be heard elsewhere, there were other disputes raised by the appellant that would fall outside those frameworks. These disputes, as pointed out, included the complaints that the 2nd and 3rd respondents breached his rights by violating the *Mining Act* and specifically breached the appellant's rights to life, right to property, right to access to information, and fair administrative action. The appellate court noted that even if some of these issues were properly before the trial court, questions would still arise concerning the nature of the orders that the trial court should have made after declining to entertain the environment and energy disputes, which were the core issues being raised in the appeal before it.



28. Furthermore, adopting the findings of this Court in *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* SC Petition No 3 of 2020 [2020] eKLR (*The Benson Ambuti Case*) and *Eaton Towers Limited v Kasing'a & 5 others* (Civil Appeal 49 of 2016) [2022] KECA 645 (KLR) (28th April 2022) (Judgment)), the appellate court held that the responsibility to bring a petition that was not multifaceted was always on the appellant. That, when the appellant was confronted with the objection to the petition, he had the option to seek leave to amend his petition, trimming off matters that belonged elsewhere in the first instance and having reached the correct decision that it lacked original jurisdiction with respect to certain claims in the petition, then the trial court had no business splitting the petition on behalf of the appellant to retain matters it would properly have been seized of.
29. In conclusion, the Court of Appeal held that nothing forecloses the appellant, subject to the law of limitation, from filing another suit, excluding the matters under *EMCA* and the *Energy Act* and that the trial court's final order was not made sua sponte but was a valid decision following the trial court's determination that it lacked original jurisdiction with respect to some of the claims in the multifarious petition.

iii. Proceedings at the Supreme Court

30. Aggrieved by the Judgment and Orders of the Court of Appeal, the appellant has now filed this Petition of Appeal dated March 10, 2023 arguing that the points of law to be determined before this Court are on the:
- (a) Breach of articles 22, 23, 27(1), 70, and 162(2)(b) of the *Constitution* read together with sections 13 of the ELC Act and section 3 of EMCA on jurisdiction of the ELC regarding environmental disputes/claims.
 - (b) Breach of articles 27(1), 35, and 47 of the *Constitution* regarding access to information and fair administrative action in light of the 6th respondent's administrative silence and or inaction.
 - (c) Breach of right to fair hearing contrary to article 50(1) of the *Constitution*.
 - (d) Breach of right to access to justice enshrined under article 48 of the *Constitution* premised on the application of the doctrine of sua sponte.
 - (e) Breach of article 163(7) of the *Constitution*.
31. As a result, the appellant seeks the following reliefs:
- (i) An order setting aside the Court of Appeal's decision made on February 3, 2023.
 - (ii) An order pursuant to section 22 of the *Supreme Court Act* remitting the Petition dated September 1, 2019 for hearing before the Environment and Land Court by any Judge other than Justice Anthony Ombwayo.
 - (iii) Any other order deemed appropriate by the Honourable Court.
 - (iv) Costs be awarded to the appellant.
32. In opposition, the 1st, 4th, 5th & 7th respondents filed grounds of objection dated June 19, 2023. The 2nd respondent filed a replying affidavit sworn on April 24, 2023 while the 3rd respondent filed grounds of opposition dated April 24, 2023. The 8th respondent on its part filed a notice of preliminary objection dated April 12, 2023, grounds of objection dated April 12, 2023, and replying affidavit sworn by Jude Ochieng on April 17, 2023 primarily challenging this Court's jurisdiction to hear the instant appeal as of right. The 3rd interested party filed a replying affidavit sworn on April 10, 2023 in support of



the petition. In rejoinder, the appellant filed a further affidavit sworn on May 22, 2023. The grounds for and against the appeal as urged by the parties are set out in detail as part of the parties' respective submissions below.

D. Parties' Submissions

i. appellant's case

33. The appellant relies on the averments in his further affidavit sworn on May 22, 2023, his written submissions dated June 8, 2023 and filed on June 12, 2023 as well as further submissions dated July 3, 2023 and filed on July 7, 2023. Therein, he addresses five issues for determination by the Court. They are;
- (i) Whether this court has jurisdiction to hear and determine the petition.
 - (ii) Whether the Court of Appeal breached articles 22, 23, 27(1), 70, and 162(2)(b) of the Constitution as read together with Section 13 of the *Environment and Land Court Act* and section 3 of EMCA on jurisdiction of the ELC regarding claims of administrative silence against the 6th respondent.
 - (iii) Whether there was breach of articles 27(1), 35, and 47 of the Constitution regarding to access to information and fair administrative action in light of the NEMA administrative silence and/or inaction.
 - (iv) Whether there was breach of the right to access to justice and fair hearing contrary to article 19, 22(1) & (2), 27(1), 48 and 50(1) of the Constitution.
 - (v) Whether there was breach of article 163(7) of the Constitution.
 - (vi) Whether the court erred in awarding costs against the appellant.
34. Regarding the issue of the jurisdiction of this Court to consider his petition, the appellant contends that his case involves constitutional issues falling within the purview of this Court's jurisdiction under article 163(4)(a) of the Constitution. The constitutional matters for this Court to address are said to include the Court of Appeal's omission to address the jurisdictional question outlined in article 70(1) of the Constitution when determining the forum for claims of article 42 violations which provides the right to a clean and healthy environment. Furthermore, the appellant asserts that other constitutional issues requiring this Court's attention include the NET'S ability to enforce articles 35 and 47 of the Constitution concerning access to information and fair administrative action in light of NEMA's administrative silence and failure to enforce its stop order favoring the appellant and Ramba area residents and directed at the 2nd and 3rd respondents.
35. The appellant also raises concerns about the enforcement of article 40 of the Constitution against the 8th respondent, KPLC. He argues that both the Court of Appeal and ELC overlooked the fact that the claim against KPLC in the trial court was beyond the Energy Act's scope, if read with article 40(2) of the Constitution.
36. The appellant has furthermore raised the question whether the Court of Appeal addressed the trial court's action, sua sponte, and whether the latter failed to provide reasons for its final decision. The appellant asserts that the Court of Appeal erroneously upheld the ELC's decision, which involved striking out his entire petition without allowing parties to be heard on the unaffected sections of the appeal.



37. On the issue of whether the Court of Appeal breached articles 22, 23, 27(1), 70, and 162(2)(b) of the Constitution as read together with section 13 of the *Environment and Land Court Act* and Section 3 of EMCA on jurisdiction of the ELC regarding claims of administrative silence against NEMA, the appellant submits that ELC and the Court of Appeal ignored the scope of the preliminary objection raised by the 2nd respondent thereby intentionally ignoring the jurisdiction conferred under article 70 of the Constitution which grants original jurisdiction to the ELC to address and resolve violations of rights protected under article 42 of the Constitution and that this jurisdiction is also explicitly outlined in Section 13 of the ELC Act as well as Section 3 of EMCA. Consequently, the appellant argues that the Court of Appeal erred in not applying articles 22, 23, 27(1), and 42, in conjunction with articles 69, 70, and 162(2)(b) of the Constitution.
38. The Court of Appeal, according to the appellant, also incorrectly concluded that the enforcement of the 6th respondent's stop order fell under NEMA's purview and was not enforceable under articles 42, 47, and 70 of the Constitution and emphasizes that the jurisdiction provided by article 70 is applicable even though there exist other dispute resolution mechanisms on the same issues. On this submission, he relies on this Court's decision in the Benson Ambuti Case (*supra*) where the Court held that the jurisdiction by the ELC to hear and determine claims *inter alia* relating to breaches of the right to a clean and healthy environment.
39. The appellant furthermore contends that, the Court of Appeal made an error in applying the reliefs test to displace article 70 of the Constitution and this was done without considering that the petition had sought to enforce articles 35 and 47 within the context of rights under article 42 of the Constitution. In addition, that the Court of Appeal ignored the 6th respondent's admission that the 2nd and 3rd respondents had not been issued with any license or permit to undertake the impugned activities and so the issue was beyond contestation.
40. On the issue of breach of articles 27(1), 35, and 47 of the Constitution pertaining to access to information and fair administrative silence and/or inaction, the appellant submits that the administrative silence by NEMA did not amount to a decision within the meaning of section 9 of the Fair Administrative Actions Act. To the contrary, he argues that the failure to enforce the said stop order issued by NEMA was an administrative silence enforceable under the right to fair administrative action pursuant to article 47 of the the Constitution.
41. The appellant thus submits in the above context that, the decisions by the superior courts limited the enforcement of his rights to access information and fair administrative action, as relates to the stop order issued by NEMA which stop order affected his constitutional right under article 42 of the Constitution. That NEMA also communicated the stop order but failed to provide the order itself, creating a legitimate expectation nonetheless that it would enforce it in his favour. He thus argues that a legitimate expectation having arisen, then it was enforceable under article 47 of the Constitution and not under section 129(2) of EMCA. In that regard, the appellant argues that the Court of Appeal erred in finding that the silence by NEMA amounted to a decision appealable under section 129(2) of EMCA.
42. The appellant furthermore underscores the point that, the trial court allowed the preliminary objection raised by the 2nd respondent on grounds that environmental issues under EMCA should always be referred to the 6th respondent at the first instance. It is his contention on the contrary that the said objection was ripe for dismissal since the jurisdiction of ELC, as enshrined in article 70(1) of the Constitution and provided under sections 3(2) and 13 of EMCA, is extensive enough to address questions of fair administrative actions relating to the right to clean and healthy environment raised in the petition.



43. On the issue of breach of the right to a fair hearing and access to justice contrary to articles 50(1) and 48 of the Constitution, the appellant submits that the ELC and the Court of Appeal acted sua sponte in striking out his entire petition without affording the parties the right to be heard. He emphasizes that the preliminary objection only targeted specific issues relating to the ELC's jurisdiction concerning environmental matters and despite this limited scope, the Court of Appeal erred in upholding ELC's decision without considering the error committed by that court and properly pointed out by the appellant.
44. In challenging the Court of Appeal's findings, the appellant also contends that the said court, in finding that the appellant could pursue the issues in the petition afresh before the court subject to the law of limitation, infringes upon his right to a fair hearing. He argues that this approach imposes new processes and obstacles, including limitations under the law, despite the appellant initially and properly approaching the court within the provisions of articles 70 and 162(2)(b) of the Constitution.
45. Additionally, the appellant argues that the Court of Appeal constrained his right to a fair hearing by asserting that matters related to arbitrary entry onto the property by KPLC should be addressed by EPRA, despite the admission by KPLC that EPRA lacked jurisdiction to grant the orders sought, thus limiting the appellant's rights to equal protection of the law under article 27(1), access to justice under article 48 and a fair hearing under article 50(1) of the Constitution.
46. On the issue of whether there was a breach of article 163(7) of the Constitution, the appellant states that other courts are bound by the decisions of the Supreme Court. In that regard, he argues that the Court of Appeal departed from this Court's decision in the Benson Ambuti Case (supra) on how a court should deal with multifaceted claims, contrary to article 163(7) of the Constitution, thus undermining the appellant's rights under articles 22, 23, 50(1) and 163(7) of the Constitution.
47. On the issue of costs, the appellant claims that the appellate court erred in condemning him to pay the costs of the appeal in light of the position taken by the ELC that the petition raised public interest issues. He further submits that the order on costs by the Court of Appeal was punitive in light of the reference by Tuiyott J that 'a party who has deliberately and in bad faith crafted pleadings so as to cheat jurisdiction' ought to bear the costs of his petition. He submits that the harsh words used in the judgment had the effect of punishing, embarrassing and deterring him from pursuing public interest litigation relating to the claims in the petition, contrary to articles 23 and 48 of the Constitution. In conclusion, he urges the Court to allow his appeal and grant the reliefs as sought in his petition.

ii. 3rd Interested party's case (In support of the Petition)

48. Katiba Institute, the 3rd interested party's submissions are dated June 20, 2023 and filed on June 21, 2023 wherein they submit on five issues: whether this Court has jurisdiction to hear and determine the matter; whether the Court of Appeal erred in law in finding that the ELC had no jurisdiction to hear and determine the appellant's claims; whether the Court of Appeal erred in law in interpreting the allegations of violation of the appellant's rights under articles 48 and 50(1) of the Constitution; whether the Court of Appeal erred in law by failing to uphold article 167(3) of the Constitution; and whether the Court of Appeal erred in law in issuing an order of costs against the appellant.
49. On the question of jurisdiction, they submit that this Court has jurisdiction to determine the appeal because the orders sought before the ELC and the Court of Appeal are in line with article 163(4)(a) of the Constitution and primarily centered on the interpretation of articles 40, 42, 48, 70 and 162(2) of the Constitution. In so saying, the 3rd interested party relies on this Court's decisions in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others SC Application No 2 of 2011



[2012] eKLR and Ngugi v Commissioner of Lands; *Owindo & 63 Others (Interested Party)* (Petition 9 of 2019) [2023] KESC 20 (KLR) (31 March 2023) (Judgment).

50. On the issue of whether the Court of Appeal erred in finding that the ELC had no jurisdiction to hear and determine the appellant's claims, the 3rd interested party argues that the Court of Appeal misinterpreted section 129(2) of EMCA, contending that it wrongly concluded that NET should handle disputes related to NEMA's failure to enforce its stop orders as that section only specifies NET's jurisdiction when NEMA has made a decision, not when the 6th respondent, as happened in the present case, has issued a stop order which the 2nd and 3rd respondents disobeyed. They argue that the appellant was therefore right to challenge NEMA's failure to enforce the stop orders under article 42 of the *Constitution* and invoking articles 22 and 23 to seek judicial review orders for violation of his right to fair administrative action.
51. Moreover, the 3rd interested party maintains that the Court of Appeal overlooked the ELC's dual jurisdiction—both original and appellate—under article 162(2)(b) of the *Constitution* and section 13(1) of the *ELC Act*. They argue in that context that, the ELC has the authority, as outlined in section 3(3) of *EMCA*, to interpret matters involving violations of articles 42 and 70 as argued by the appellant.
52. Additionally, the 3rd interested party criticizes the Court of Appeal for wrongly attributing jurisdiction to EPRA over allegations made against KPLC for unlawfully entering the appellant's property. They argue in that regard that, EPRA lacks the authority to grant orders, especially declarations of a violation of the appellant's property rights, as these matters fall under the ELC's jurisdiction according to article 162(2) of the *Constitution*. The 3rd interested party thus asserts that, neither EPRA nor the EPT have the jurisdiction to interpret constitutional provisions or grant remedies under the *Constitution*.
53. Building on the above submission, the 3rd interested party contends that the appellant's rights under articles 48 and 50(1) were violated as he now lacks a forum where he can raise the constitutional violation of his right under article 42 of the *Constitution*, violated by the 2nd and 3rd respondent by proceeding with their mining activities without an EIA licence and with a stop order by NEMA issued against them.
54. The 3rd interested party also submits that the Court of Appeal erred in failing to uphold the provisions of article 163(7) of the *Constitution*, which enshrines the principle of precedence. It is their submission that by failing to uphold the decision by this court in the *Benson Ambuti Case* (supra) which provides guidance on handling petitions with multifaceted issues.
55. Finally, on the issue of whether the Court of Appeal erred in issuing costs against the appellant, the 3rd interested party argues that this is a public interest matter and there ought not to be any order as to costs.

iii. 1st, 4th, 5th & 7th Respondents' Case

56. The 1st, 4th, 5th, & 7th respondents' submissions are dated June 19, 2023 and were filed on June 22, 2023. The said respondents' submissions are focused on two issues, which are: whether the instant appeal raised a question of constitutional interpretation or application to warrant determination at this court; and whether this court ought to remit proceedings for hearing before the ELC by any judge other than Ombwayo, J.
57. They contend that the appeal, which does not identify or specify how the appeal relates to the interpretation and application of the *Constitution*, does not meet the jurisdictional threshold as stipulated under article 163(4)(a) of the *Constitution*. It is their submission in that context that, the ELC did not have jurisdiction to adjudicate the dispute in the first place, as it was only endowed with



supervisory and appellate jurisdiction under article 165(6) and (7) of the Constitution. Therefore, in the absence of ELC pronouncements on the merits of constitutional breaches, the appellant cannot invoke this court's jurisdiction under article 163(4)(a) when superior courts themselves were not vested with the authority to examine the constitutional merits of the dispute.

iv. 2nd respondent's case

58. The 2nd respondent's submissions are dated 3rd July 2023 and filed on July 4, 2023. The 2nd respondent, who also challenges the jurisdiction of this Court on comparable grounds as the 1st, 4th, 5th, and 7th respondents adds that, had the appellant heeded the signal indicated by the preliminary objections before the trial court, he would have had ample time to amend his multifaceted petition.
59. Nevertheless, the 2nd respondent maintains that the appellant's constitutional right to be heard remains unimpeded, and he is at liberty to ventilate any complaint before the appropriate forum, ensuring all statutory remedies are exhausted before moving to any court. He further asserts that the petition is misplaced and geared towards frustrating the respondents from moving on with their project and have been kept in perpetual litigation to their detriment. He therefore prays that the petition be struck out for want of jurisdiction with costs.

v. 3rd respondent's case

60. The 3rd respondent's in written submissions dated July 3, 2023 and filed on July 5, 2023 challenges this court's jurisdiction on the same basis as the preceding respondents. In that regard, the 3rd respondent argues that, since the appellant's appeal at the Court of Appeal was dismissed solely due to a lack of jurisdiction—an issue purely based on law—it cannot be considered as having been substantively heard on constitutional matters, thus not justifying this Court's intervention. The 3rd respondent further contends that no question arises regarding which constitutional provision was misinterpreted by the superior courts below, given that the decision of the ELC was founded on the Energy Act, 2019 and EMCA only. Consequently, any appeal to this Court should have been limited to certification under article 163(4)(b) of the Constitution which is not the case.

vi. 8th respondent's case

61. The 8th respondents written submissions are dated June 21, 2023 and were filed on June 26, 2023. Similarly, it objects to this Court's jurisdiction since the appeal does not fall within the ambit of article 163(4)(a) of the Constitution. The 8th respondent argues in that context that this appeal is founded on an interlocutory decision of the superior courts that did not delve into any substantive constitutional issues. In support of this proposition, they rely on this Court's decisions in Paul Mungai Kimani & 2 other v Kenya Airports Authority & 3 others SC Petition No 11 of 2019 [2021] eKLR and Ananias N Kiragu v Eric Mugambi & 2 others Civil Application No 10 of 2019 [2020] eKLR.
62. The 8th respondent further contends that the mere invocation of alleged contraventions of constitutional provisions in the appellant's pleadings before this court does not confer jurisdiction under article 163(4)(a) of the Constitution. It argues that the constitutional issues raised in the petition arise from the appellant's perception and or own interpretation as opposed to the Court of Appeal's declarations.
63. Accordingly, the 8th respondent reiterates the findings of the appellate court, emphasizing that if infringement can be redressed within the legislative framework, it should be the preferred course to follow unless the framework fails to effectively address a litigant's complaint. Additionally, the 8th respondent asserts that, since the appellant, an advocate, did not amend his pleadings to exclude matters



falling outside the court's jurisdiction after preliminary objections were raised, it is only just that costs against him should be awarded automatically.

E. Issues for Determination

64. Having considered the parties' pleadings and submissions in the instant petition, this court is of the considered view that the issues arising for determination are;
- (a) Whether the appellant has properly invoked this court's jurisdiction under article 163(4)(a) of the Constitution.
 - (b) Whether the appellant was required to exhaust the alternative dispute resolution mechanisms under EMCA and the Energy Act before filing his constitutional petition at the Environment and Land Court.
 - (c) Whether the Court of Appeal erred in finding that the appellant could amend his petition once a preliminary objection has been raised.
 - (d) Remedies available to a party in a multifaceted claim.
 - (e) What orders are to be issued by this court?
 - (f) Who should bear the costs of this appeal?

We now proceed to address these issues below.

F. Analysis

i. Whether the appellant has properly invoked this court's jurisdiction under article 163(4)(a) of the Constitution.

65. The respondents have questioned the jurisdiction of this court to hear and determine this matter. They urge that there is nothing of constitutional interpretation and/or application in the appeal invoking this Court's jurisdiction under article 163(4)(a) of the Constitution. Specifically, the 1st, 4th, 5th & 7th respondents assert that the appellant cannot invoke this Court's jurisdiction under article 163(4)(a) when both the ELC and the Court of Appeal lacked the mandate to examine the merits of the dispute. The 3rd respondent further adds that there is no constitutional provision that was misinterpreted by the superior courts, while the 8th respondent contends that this appeal relies on an interlocutory decision of the superior courts that did not address substantive constitutional issues.
66. On our part, we are alive to the fact that the appellate jurisdiction of this court is as set out in article 163(4) of the Constitution, which provides that:
- “ Appeals shall lie from the Court of Appeal to the Supreme Court;
- (a) as of right in any case involving the interpretation or application of this Constitution; and
 - (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”
67. As to what constitutes a matter involving interpretation and application of the Constitution, our approach has always been that a specific provision(s) of the Constitution must have been an issue for interpretation and/or application by both the High Court and courts of equal status as well as the Court of Appeal. In the Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Anor SC



Petition No 3 of 2012 [2012] eKLR, we thus delineated our jurisdiction under article 163(4)(a) of the Constitution as follows:

“... This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court ...

(28) The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation ...”

68. Similarly, our decisions in Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board SC Petition No. 5 of 2012 [2012] eKLR, Hassan Ali Jobo & Another v. Suleiman Said & Others SC Petition No 10 of 2013 [2014] eKLR and Gatirau Peter Munya v Dickson M Kitinji & Others SC Application No 5 of 2014, [2014] eKLR (The Munya 1 case) settled the issue as we held that appeals are admissible before this Court if it can be demonstrated that the matter involved the interpretation or application of the Constitution and had been the subject of litigation before the High Court and the Court of Appeal and then risen through the judicial hierarchy on appeal.

69. In John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others; SC Petition No. 17 of 2015; [2019] eKLR (John Florence Maritime Services), we specifically held as follows:

“... As to what constitutes a matter involving interpretation and application of the Constitution, the conventional approach is that a particular provision of the Constitution must have been in issue for an interpretation and/or application from the High Court and the Court of Appeal ...”

70. However, there is a broader approach as to what would constitute a matter involving constitutional interpretation or application, where, even if a specific constitutional provision is not directly in question, the appellant must demonstrate that the court’s reasoning and conclusions led to a determination that can be considered a trajectory of constitutional interpretation or application. In the Munya 1 case, supra this court thus expounded on this broader approach while relying on its earlier decision in Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others, SC Petition No 2 of 2012 [2012] eKLR case, where the court stated at [paragraph] 69:

“The import of the court’s statement in the Ngoge case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.” [Emphasis own]

71. From our finding in the Munya 1 case the focus should not therefore solely be on the explicit mention of a constitutional provision but also the overall context and impact of the court’s reasoning in relation to constitutional matters. In John Florence Maritime Service, supra, we added that the court should not have a narrow mind when evaluating whether a matter raises a constitutional issue, and that the



search for constitutional issues should extend beyond specific constitutional provisions. It was our determination in that regard that:

“ [34] It therefore emerges that in evaluating whether a matter raises a constitutional issue of interpretation and/or application, this court should not be narrow-minded in its inquiry. The quest for discovery should not start and stop with a determination of whether or not there is a specific provision of the Constitution that was at issue before the Superior courts. Instead, there is need for a holistic inquiry of all the various facets of the law as pleaded by the parties if they do indeed raise a constitutional question. This is the constitutional trajectory that requires a look at a court(s)’ reasoning and even the processes and procedures adopted by a court in its proceedings.”

72. Consequently, it is our view that a determination of whether an appeal before us satisfies the criteria for invoking the Court’s appellate jurisdiction is not governed by rigid principles. Instead, it is a power exercised by the court on a case-by-case basis but within the confines of the Constitution and statute. In that regard, this was our finding in John Florence Maritime Services, supra:

“ [39] It again follows that a determination of whether a matter has met the appellate jurisdictional threshold embodied in article 163(4)(a) of the Constitution is not based on principles cast in stone. This is a discretionary mandate and power that the Supreme Court exercises judiciously on a case to case basis. Therefore, where a litigant before this court alleges that in exercise of their constitutional mandates, the Superior Courts contravened the Constitution in the conduct of their proceedings, in protecting the Constitution that is the embodiment of the aspirations of the People of Kenya, this Court may assume jurisdiction to correct such an anomaly.

[40] It should be noted that it does not follow as a matter of course that where a litigant, like the appellants before us, files a Petition of appeal, which appeal prima facie triggers the discretion of this Court and the court assumes jurisdiction, that that appeal must succeed. Assumption of jurisdiction is a legal question at the discretion of this court. On the contrary, success or otherwise of an appeal is a factual issue determined on merit on the basis of the peculiarity of each case and how those facts are applied to the law.”

73. To put the above findings in context, in John Florence Maritime Services, supra, the respondents had urged the court to strike out the appellant’s case for want of jurisdiction, since its case before the High Court had also been struck out for being *res judicata*. The appellant however urged this court to find that, as a consequence of the *res judicata* finding, his right to a fair hearing under article 50(1) of the Constitution was denied. It was our finding that, should the appellant prove that the determination of its claim by the High Court took a constitutional trajectory then we would seize jurisdiction and interrogate the merits of his appeal and specifically stated thus:

“ [35] Consequently, to para-phrase what we laid out in the Joho case, a question regarding the interpretation and application of the Constitution may arise from a multiplicity of factors and not necessarily an interpretation and application of a specific provision of the Constitution. Upon consideration, we are inclined to find that the Appellants’ case fits this bill. While the High Court and Court of Appeal were only charged with a common law doctrine of *res judicata*, it is



alleged that the manner in which the High Court applied the doctrine in its proceedings infringed upon article 50(1) of the Constitution, by denying the Petitioners a right to be heard.

[36] Such a contention by a litigant before this court draws the court's attention particularly given the fact that the right to Fair hearing provided for by article 50(1) of the Constitution is a non-derogable right under article 25 of Constitution. If the petitioners' contentions were to be found to have merit, then it cannot be otiose to conclude that, the determination of the High Court took a constitutional trajectory by infringing on a fundamental right. The appellants' allegations, if affirmed, would suffice to conclude that while the court was considering the application of a common law doctrine of *res judicata*; its determination took a trajectory that infringed on article 50(1) of the Constitution."

74. Returning to the matter at hand, a perusal of the appellant's case reveals that the appellant has questioned the manner in which the ELC and the Court of Appeal interpreted the constitutional provision conferring jurisdiction on the ELC to determine the petition, and implores this Court to find that the issues raised before the ELC were proper and ought to have been determined in light of article 70 and 162(2) of the Constitution. This is also in addition to the appellant's argument where he raises concerns on NET'S and EPT's capacity to enforce articles 35 and 47 of the Constitution, given NEMA's administrative silence and failure to enforce its stop order, impacting the appellant and Ramba area residents as well as the jurisdictional limitations imposed by law on EPRA and EPT. Further, he has questioned the superior Courts' determination that, claims involving article 42 violations fall under the NET'S jurisdiction and not ELC's and that complaints directed at KPLC should be determined by EPRA and later EPT.
75. Having considered the matter, it is our firm finding that the above issues fall squarely within this court's appellate jurisdiction in article 163(4)(a) of the Constitution and call for us to determine them as a matter of constitutional interpretation and application. This is also because the question of ELC's jurisdiction requires interpretation of articles 162(2) as read with articles 40, 42 and 70 of the Constitution and whether the superior courts properly applied their mind to the petition that had invoked those articles. It is also necessary for us to consider the context in which the appellant claims that various rights enshrined in the Constitution were violated, and whether the trial court ought to have heard his plea and interrogated those violations.
76. The upshot is that the appeal correctly invokes this court's jurisdiction to the extent of determining these questions and the objections raised by the respondents are consequently overruled. In addressing subsequent issues below, this finding will further be fortified.

ii. Whether the appellant was required to exhaust the alternative dispute resolution mechanisms under EMCA and the Energy Act before filing his constitutional petition at the Environment and Land Court

77. The appellant faults the determination by the Court of Appeal that his complaint against KPLC relating to a way leave for its transmission lines was to be first resolved by EPRA, and an appeal on such a decision would be handled by the EPT before escalation to the ELC, hence limiting the enjoyment of his right to property under article 40 of the Constitution. The appellant also contends that the administrative silence/and or inaction by NEMA in failing to act on the non-compliance of the stop order issued against the 2nd and 3rd respondents violated his right to equal protection before the law under article 27(1) and the right to fair administrative action under article 47 of the Constitution.



78. Both superior courts found that the disputes against KPLC and NEMA were to be determined elsewhere, and not before the ELC and the trial court, while upholding KPLC's objection on jurisdiction, and held that the appellant's complaint against the 8th respondent was to be determined, initially by EPRA. In that regard, it stated thus (per Tuiyott JA):

“I do find that the Petitioner's complaint against the 8th respondent is in respect of way leaves, easements, or rights of way in relation to the distribution and supply of electrical energy. The petitioner alleges that the 8th Respondent has allowed electrical posts to be placed in his parcel of land and that the Authority has the power to entertain the dispute. If dissatisfied, the petitioner can move to the Tribunal. This court further finds that Section 9 (2) and 3 of the *Fair Administration Act 2015* removes this kind of disputes from this court and places jurisdiction to the Energy Authority.”

79. The learned judge in finding as above, then proceeded to state:

“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) ...

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 ...

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*.”

80. Again, addressing the dispute resolution system under EMCA, the trial court, in finding that the appellant's dispute against the 2nd and 3rd respondent was to be determined by NEMA held:

“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.

Section 58 provides for an Environmental Impact Assessment Licence which the authority has the power to issue.



This is followed by section 63 that provides that The Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. The authority has the power to cancel or revoke a licence or suspend such licence for such time not more than 24 months where the licensee contravenes the provisions of the licence.

The *Environment and Co-ordination Act (EMCA)* (cap 387) Laws of Kenya provides for the National Environmental Tribunal with the powers to hear appeals from the decisions of NEMA. Any person dissatisfied by the decision of the tribunal can appeal to the ELC. Under section 130 of the *Environment and Co-ordination Act (EMCA)* (cap 387) Laws of Kenya.”

81. The Court of Appeal (Tuiyott, JA) on its part found as follows:

“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.”

82. In making the above findings, the superior courts both applied the doctrine of exhaustion and the question as to whether a party is required to exhaust any dispute resolution mechanism provided by a statute and/or any other law before resorting to the courts. More specifically, whether exhausting the appeal process set out under sections 129 and 130 of *EMCA* as well as the dispute resolution system as set out under Sections 10 and 36 of the *Energy Act*, for the claim against KPLC, is an issue that must be resolved by this judgment.

83. This is because the resolution of environmental issues before NEMA has been the subject of prior decisions by our superior courts and two schools of thought have emerged in that regard. On one hand, there is a series of decisions that have taken the position that, even though the ELC has original and appellate jurisdiction on environment and land matters, parties should exhaust the mechanisms provided for under EMCA, by first referring a matter to NET before an appeal can lie to the ELC.

84. This was the position taken in *Orata International Limited v National Environment Management Authority* [2019] eKLR, where the ELC (Christine Ochieng, J), while upholding a preliminary objection raised as to its jurisdiction to grant judicial review orders held:

“In relying on the facts above and the three authorities, I find that in so far as the Environment & Land Court Act gives original and appellate jurisdiction on environment and land matters to the Environment & Land Court, the prayers sought in the instant application cannot hold at this juncture as the Applicant has a remedy to refer the complaint to the National Environment Tribunal first before an appeal can lie to the Environment and Land Court (ELC). Since there is already an established avenue under *Environmental Management and*



Coordination Act (EMCA) to deal with the Applicant’s complaint. I am unable to grant him leave but direct him to lodge an Appeal with NET. Since I have already made my findings above, I will not deal with the second issue.”

85. Similarly, Angote J, in Borbor & 2 others v National Environment Management Authority (Environment and Land Judicial Review Case 2 of 2022) [2022] KEELC 3947 (KLR) (28 July 2022) (Ruling) applied the doctrine of exhaustion in finding that an applicant who is aggrieved or seeks to challenge the acts of NEMA ought to first move NET pursuant to Section 129(2) of the EMCA and not the Court.

86. The learned judge in so saying was guided by the pronouncements by the Court of Appeal in National Environmental Tribunal v Overlook Management Limited & 5 Others [2019] eKLR. The Court of Appeal in that case and with a view to reconciling the conflicting decisions on the question of NEMA’s jurisdiction held:

“... where a party considers itself aggrieved by the events stipulated in section 129 (1) (a)-(e) of the Act, such a party may as of right appeal.... Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3rd respondent, its Director-General or its committees, then such a party lodge an appeal pursuant to sub-section 2 of that provision.”

87. Furthermore, the Court of Appeal in Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR, (Asike- Makhandia JA with Kiage JA as Odek JA had passed on before delivery of judgment), while faulting the ELC for assuming jurisdiction before the parties had exhausted other mechanisms in resolving their dispute held (per Asike- Makhandia JA) held:

“... I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

In addition, section 129(3) of EMCA confers power upon the NET to *inter alia* exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of section 129(3) of EMCA is an all- encompassing provision that confers at first instance jurisdiction upon the Tribunal... It was never the intention of the Constitution makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court.”

88. There is however another school of thought that has posited that, if the complaints and prayers by a petitioner relate to infringement of the constitutional right to a clean and healthy environment or any other constitutional violation, then NET lacks the jurisdiction to determine the constitutional issue hence the provisions of Section 129 of EMCA are inapplicable to such claims.



89. In the above context, in *Ken Kasinga v Daniel Kiplagat Kirui & 5 others* [2015] eKLR, Emukule, J (as he then was) of the High Court, in finding that the ELC has unlimited jurisdiction to determine the question of whether a right to fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, stated:

“... In my view, so long as a dispute can be categorized as being a dispute over environment, or over land, the ELC has unlimited jurisdiction. This jurisdiction is both original and appellate. One cannot therefore be faulted if he originates his suit in the ELC and not in NET, for the ELC has original jurisdiction. I am unable to accept the argument of the respondents, that the ELC has no jurisdiction in a matter concerning the issuance or rejection of an EIA licence. True, a person aggrieved by the decision has the avenue to appeal to NET within 60 days, but that does not mean that he is prevented from contesting that decision in an appropriate pleading filed in the ELC as a court of first instance ...” [Emphasis ours]

90. Further, in *West Kenya Sugar Co. Limited v Busia Sugar Industries Limited & 2 others* [2017] eKLR, Mukunya J, while addressing the ELC’s jurisdiction to determine a constitutional petition where the petitioner had alleged violations of his rights under the *Constitution*, held that the mandate given to the NET under Section 129 of EMCA is limited in the scope of matters it can handle on appeal, and rendered itself thus:

“This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the *Constitution*. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is the preserve of this Court. A look at the mandate given to the National Environment Tribunal under section 129 of EMCA aforesaid shows a limited scope of the matters it can handle on appeal. They particularly deal with license and licensing...

This court was established by article 162(2)(b) of the *Constitution of Kenya 2010*. One of its mandate therein is to determine the environment and the use and occupation of and title to land. The issues herein deal with the environment use and occupation of land ...” [Emphasis ours]

91. On our part, in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (NGOs Co-ordination Board) we outlined the doctrine of exhaustion of administrative remedies and adopted our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR where we 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.”

92. In the above decision, we furthermore 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.



93. This position was also adopted by the Court of Appeal in *R v National Environmental Management Authority*, CA No 84 of 2010; [2011] eKLR that we persuasively relied on in NGOs Co-ordination Board (*supra*). The Court of Appeal in doing so, 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 ...” [Emphasis ours]

94. 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.

95. But the above decisions do not unravel the conflict alluded to above because, under article 165(1)(c) of the *Constitution*, the High Court has the jurisdiction to determine whether a right or fundamental freedom outlined in the Bill of Rights has been denied, violated, infringed upon, or is under threat. In that context, article 165(5)(b) imposes limitations on the High Court's jurisdiction concerning matters falling within the purview of the courts specified in article 162(2) which provides that;

“Parliament shall establish courts with the status of the High Court to determine disputes relating to

- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.”

96. Consequently, article 165(2)(b) mandates the establishment of courts possessing the status of the High Court to inter alia and of relevance to the appeal before us, address issues related to the environment, as well as the utilization and ownership of land with Parliament assuming the responsibility to delineate the functions and jurisdiction of that court as stipulated in sub- article (3).

97. In this context, and in the exercise of these powers, Parliament enacted the Environment and *Land Act* 2011, (No 19 of 2011) and by section 4 thereof established the ELC. Its jurisdiction is as provided for in section 13 with Section 13(1) specifically outlining that the court ‘shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 163(2)(b) of the *Constitution*’. Section 13(2) then grants express and original jurisdiction in matters;

- (a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.



And further provides;

“Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under articles 42, 69 and 70 of the Constitution.”

98. These provisions must be read in contrast to those in EMCA which provide for instances where disputes pertaining to compliance with breach and/or violations of the provisions of EMCA and which disputes ought to be lodged with and/or addressed by NET, which is established pursuant to the provisions of section 125 of the said Act. Redress for constitutional violations is not part of that mandate.
99. In addition to, and turning to the provisions of the Energy Act, it is uncontested that the said 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.
100. 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. In so saying, we are persuaded by the finding of the Court of Appeal in Kenya Revenue Authority & 2 others vs Darasa Investments Ltd [2018] eKLR which held as follows:

“What then, is the consequence, if any, of the respondent’s failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others [2017] eKLR and Kenya Revenue Authority & 5 others v Keroche Industries Limited CA No 2 of 2008. Perhaps that is why the legislature at section 9(4) of the Fair Administrative Action Act stipulates that:

“Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

Our reading of the above provision reveals that contrary to the appellant’s contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.”



101. Reference to the High Court above must be read *mutatis mutandis* with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.
102. In the above context, what was in issue in the appellant’s petition? The appellant claims as regards the environmental question that, NEMA issued a stop order that was favourable to him but that NEMA failed to enforce the stop order. Despite the existence of the stop order, the 2nd and 3rd respondents continued their mining activities. The issue therefore that arose in the petition was whether the acts of the 2nd and 3rd respondents, by failing to adhere to the stop order, violated the appellant’s rights under articles 40 and 42 of the *Constitution*.
103. The other claim by the appellant is that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so.
104. 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.” [Emphasis ours].
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.



106. The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in *United Bank of India vs Satyawati Tondon & Others*; (2010) 8 SCC to state as follows:

“ 44. ... we are conscious that the powers conferred upon the High Court under article 226 of the *Constitution* to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under article 226 of the *Constitution*.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under article 226 of the *Constitution* and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.” [Emphasis ours]

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).

108. It was therefore sufficient that the appellant alleged that a right in the *Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of the *Constitution* and the ELC Act, the issues raised were within the original jurisdiction of the ELC. That is also why section 3 of *EMCA* provides that, one of the general principles under the Act is the entitlement to a clean and healthy environment. That section provides:

“ Entitlement to a clean and healthy environment

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



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

“If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—

- (a) prevent, stop or discontinue any act or omission deleterious to the environment;
- (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
- (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
- (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
- (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.”

110. As we stated earlier, there is nothing that therefore bars the appellant, reading the plain provisions of the law above, from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET, as was rightfully held by the Court of Appeal. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the *Energy Act*. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify.

iii. Whether the Court of Appeal erred in finding that the appellant could amend his petition once a preliminary objection has been raised

111. The Court of Appeal while determining this issue, held that it was incumbent upon the appellant to seek leave to amend his petition to trim off matters that belonged elsewhere, once the preliminary objections on jurisdiction were raised. The Court of Appeal specifically stated in that regard:

“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.”

112. With utmost respect, the Court of Appeal was misguided in arriving at this finding. Misguided was the court because, a party cannot move to amend pleadings once a preliminary objection has been raised as relates to pleadings filed to confer jurisdiction. Preliminary objections are raised because, upon determination, the outcome would have a major bearing on the status of a claim, as the preliminary



objection raises a pure point of law which if successful, would dispose of the petition as it did in the instant case. To restate the relevant principle in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

113. The appellant presented his grievances as constitutional questions believing that his fundamental rights under the *Constitution* had been violated. The trial court proceeded to strike out his petition preliminarily for lack of jurisdiction. He chose to appeal the decision, as opposed to amending his pleadings or filing another suit. There was nothing wrong in that act and the pursuit of an appeal is the choice of a litigant as is the choice to withdraw a pleading and filing a fresh one. Indeed, courts generally take a dim view of a party acting upon a preliminary objection by taking the path of avoiding such an objection instead of facing it and letting the court determine it on the merits. This finding is also pertinent to the issue below.

iv. Remedies available to a party in a multifaceted claim

114. The appellant faults the Court of Appeal for finding that he could pursue the issues in the petition by filing a fresh suit before the ELC and that such a finding infringes upon his right to a fair hearing. He also argues that this edict imposes new processes and obstacles, including the law of limitation, despite the appellant initially approaching the court within the provisions of articles 70 and 162(2)(b) of the *Constitution*. The Court of Appeal, in making its finding aforesaid pronounced itself thus:

“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.”

115. Having already found that the ELC had the original jurisdiction to determine the appellant’s petition notwithstanding the availability of other dispute resolution mechanisms, the court is now obliged to consider whether, due to the multifaceted nature of the appellant’s petition, the ELC is the best forum to grant constitutional redress where the only other alternatives available to the appellant are not efficacious nor adequate.
116. One of the reasons the appellant approached the ELC was because he had separate claims against both KPLC and NEMA but chose to file them in the same petition earning the displeasure of the superior courts. In his petition, the appellant sought, *inter alia*, the following declarations, which we reproduce verbatim;

“(i) A declaration that the 1st to 7th respondents have jointly and severally violated and continue to violate the rights and fundamental freedoms of the petition



and the Ramba Community contrary to articles 10, 27(1), 28, 35(1), 42, 43, 47, 69(1), 73 and 75 of the Constitution.

- (ii) A declaration that the petitioner's right to property has been violated by the 2nd, 3rd and 8th respondents.
- (iii) 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".

117. 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:

“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.”

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.

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.

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.

121. We must hasten to add that, it is the 2nd and 3rd respondents alleged unabated mining activities on LR No Siaya/Ramba/716 that led them to dump waste or effluent onto the appellant's property namely LR 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 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.

[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 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.

[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 JA) 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.

v. What is the most appropriate relief available to the appellant?

126. 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.

vi. Costs

127. The appellant faults the Court of Appeal for condemning him to pay the costs of the appeal by finding that

“a party who has deliberately and in bad faith crafted pleadings so as to cheat jurisdiction.”

128. In *Okoiti & 2 others v Attorney General & 14 others* (Petition (Application) 2 (E002) of 2021) [2023] KESC 31 (KLR) (21 April 2023) (Ruling) while addressing the issue of awarding costs in public interest litigation, we specifically held that:

“Public interest litigation aims to address genuine public wrongs where legal action is initiated for the enforcement and advancement of constitutional justice and public interest.”

129. An interpretation of this finding in the present case shows that this is not a public interest matter, but private interest litigation where the appellant is pursuing his own claim against both private and public entities. Further guided by our finding in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Sup Ct Petition No 4 of 2012; [2014] eKLR where we set out the legal principles that guide the grant



of costs by finding that costs follow the event and that costs should not be used to punish the losing party but to compensate the successful party for the trouble taken in prosecuting or defending a suit, we see no reason to burden any of the parties with costs. Moreover, in view of our decision to allow the appeal, the order of costs cannot stand.

130. Consequently, we apply our discretion and order that each party shall bear their own costs at the ELC, Court of Appeal and this court.

G. Orders

131. Having found that the appeal is merited, we now issue orders as follows:

- (a) The Petition of Appeal dated March 16, 2023 and lodged on March 20, 2023 is hereby allowed and the Judgment of the Court of Appeal dated February 7, 2023 is hereby set aside in entirety as is the Ruling of the Environment and Land Court dated February 2, 2021.
- (b) The matter is hereby remitted to the Environment and Land Court at Kisumu for hearing and determination by any judge other than Ombwayo, J on the alleged constitutional violations highlighted and in conformity with this judgment.
- (c) In view of the time taken in determining the issues raised by the appellant, we direct that the hearing before the ELC shall be conducted expeditiously and on a priority basis.
- (d) Each party shall bear its costs at the ELC, Court of Appeal and this Court.
- (e) We hereby direct that the sum of Kshs 6,000 deposited as security for costs in the appeal herein be refunded to the appellant.

132. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF DECEMBER 2023.

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT OF KENYA

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W.OUKO

JUSTICE OF THE SUPREME COURT



.....
REGISTRAR
SUPREME COURT OF KENYA

