Adega & 2 others v Kibos Distillers Limited & 5 others (Petition 3 of 2020) [2020] KESC 36 (KLR) (Constitutional and Human Rights) (4 August 2020) (Ruling)

Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR

Neutral citation: [2020] KESC 36 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 3 OF 2020

DK MARAGA, CJ, PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

AUGUST 4, 2020

BETWEEN

BENSON AMBUTI ADEGA ..... 1ST PETITIONER

ERICK OCHIENG ..... 2ND PETITIONER

BETHER ATIENO OPIYO ..... 3RD PETITIONER

AND

KIBOS DISTILLERS LIMITED ..... 1ST RESPONDENT

KIBOS POWER LIMITED ..... 2ND RESPONDENT

KIBOS SUGAR & ALLIED INDUSTRIES LIMITED ..... 3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4TH RESPONDENT

COUNTY GOVERNMENT OF KISUMU ..... 5TH RESPONDENT

KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS ..... 6TH RESPONDENT

(Being an appeal from a Judgment of the Court of Appeal at Kisumu (Asike-Makhandia & Kiage JJA) delivered in Civil Appeal No. 153 of 2019 on 31st January 2020)

Principles for grant of stay orders.

The main issue for determination was whether the Environmental and Land Court (ELC) had the jurisdiction to determine issues which were not within its jurisdiction and which could have been effectively determined by

another legislatively established Tribunal where the matter was intertwined with matters within the jurisdiction of the ELC. The Supreme Court held that the Court of Appeal gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the petition, the appellate court should at that juncture have issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate.

Reported by John Ribia

Jurisdiction *– jurisdiction of the Environment and Land Court – jurisdiction over matters were not within its jurisdiction and which could have been effectively determined by another legislatively established tribunal where the matter was intertwined with matters within the jurisdiction of the ELC – whether the ELC had the jurisdiction to determine such a matter – Constitution of Kenya, 2010 article 162(2)(b); Environment and Land Court Act, 2011 sections 4 and 13; Environmental Management and Coordination Act sections 129(1), (3), 130, 130(5)*

Brief facts

The 1st, 2nd and 3rd petitioners had filed a constitutional petition before the Environment and Land Court (ELC) in Kisumu in which they claimed their rights to a clean and healthy environment had been infringed. At the ELC the respondents filed a preliminary objection that challenged the jurisdiction of the court on the premise that the court had usurped the mandate of legislatively constituted bodies and conferred upon itself powers that it did not have.

In the ELC, the Court held that it had the jurisdiction to hear and determine the petition, not by dint of powers conferred upon it by article 162(2)(b) of the Constitution or sections 4 and 13 of the Environment and Land Court Act, 2011, but by dint of the provisions of the Environmental Management and Coordination Act, and more particularly, sections 129(1) and 130 thereof. The court justified its usurpation of the mandate of the National Environmental Tribunal and the National Environmental Complaints Committee, by citing articles 23, 42, 47, 69 & 70 of the Constitution.

Aggrieved by the decision of the ELC, the respondents appealed. The Court of Appeal held that the ELC contradicted itself by determining that some of the issues that were before it could be properly ventilated before the other legislatively mandated tribunals under the Environmental Management and Coordination Act, but chose to rather strangely arrogate upon itself the mandate to hear and determine those same issues. The Court of Appeal held that the ELC did not have the jurisdiction to hear and determine the Petition, not pursuant to constitutional conferment of jurisdiction, but that the court did not have the mandate to determine issues that could have been adjudicated in other appropriate forums.

Aggrieved by the decision of the Court of Appeal, the petitioners filed the instant appeal.

Issues

Whether the Environmental and Land Court (ELC) had the jurisdiction to determine issues which were not within its jurisdiction and which could have been effectively determined by another legislatively established Tribunal where the matter was intertwined with matters within the jurisdiction of the ELC.

Held

1. A court's jurisdiction flowed from either the Constitution or legislation or both. A court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The Supreme Court would only exercise its jurisdiction over, pursuant to article 163(4)(a) of the Constitution, were issues involving the interpretation or application of the Constitution, which constitutional issues had been considered and determined by the superior courts.

2. Whilst it could be argued that the issue of jurisdiction of the Environment and Land Court (ELC) was a constitutional question given that the court was established by dint of article 162(2)(b) of the Constitution, and through legislative enactment of the sections 4 and 13 of the Environment and Land Court Act, 2011, that was however not the issue in contention before the superior courts below.
3. There was no determination made by any of the superior courts with regards to the jurisdiction of the ELC in reference to the Constitution. In both their determinations on the issue of jurisdiction, they relied solely on the provisions of the Environmental Management and Coordination Act, with peripheral reference to the Constitution to buttress their decisions. Where the interpretation or application of the Constitution had only but a limited bearing on the merits of the main cause, then the jurisdiction of the instant court could not be properly invoked.
4. Both superior courts made determinations primarily on an interrogation and adjudication of statutory provisions and minimal reference to the Constitution. It could not thus be said that the issues were determined in consideration and pursuant to the interpretation or application of the Constitution to therefore warrant an appeal to the Supreme Court under article 163(4)(a) of the Constitution.
5. The issue of jurisdiction and discretion were nonetheless inextricably intertwined; it would seem incongruous to discuss one without referring to or including the other. Such was the extent that those two quite seemingly innocuous terms were referred to quite often, and rather mistakenly, interchangeably. Jurisdiction, as referred to by the petitioners, would denote whether the adjudicatory body had the power to entertain the proceedings and, discretion, to be whether such, upon determination that it had such powers, chose to exercise such powers or not.
6. The ELC determined quite incorrectly that it had the power or jurisdiction to hear and determine the petition, which although raised issues that were clearly within its purview, were also intertwined with other issues which were rather obviously not within its jurisdiction, and which could have been effectively determined by another legislatively established tribunal, in this instance two bodies, the National Environmental Tribunal and the National Environmental Complaints Committee.
7. The trial court and the appellate Court correctly determined that the petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two superior courts was where the trial court then went further to determine that those multifaceted issues could be determined by the court in the interests of justice. The ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the petition.
8. Judicial abstention, as with judicial restraint, was a doctrine not founded in constitutional or statutory provisions, but one that had been established through common law practice. It provided that a court, though it could be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as could 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.
9. The more favourable 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 environmental impact assessment 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.
10. The Court of Appeal gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the petition, the appellate court should at that juncture have issued appropriate remedies, which could have included, but not limited to, remitting

back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was *void ab initio*, and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate.

Preliminary objections by the 1st, 2nd, 3rd, 5th and 6th respondents were upheld; the petition was struck out save that, noting the nature of the matter, the petitioners were at liberty to pursue their claims at the appropriate forum, taking guidance from the instant judgment and the judgment of the Court of Appeal; each party was to bear its own costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. There are three Preliminary Objections brought before this Court by the 1st, 2nd, 3rd, 5th and 6th Respondents. In the objections, the Respondents primarily challenge the jurisdiction of this Court to hear and determine the instant Petition pursuant to Article 163(4)(a) of the Constitution. For purposes of this Ruling, we shall briefly highlight the historical background of the matter before embarking on an analysis of each of the three objections and the salient points raised in each one of them.

B. Background

i) Petition to the Environment and Land Court in Petition No. 8 of 2013

2. On 25th October 2018 the 1st, 2nd and 3rd Petitioners herein filed a constitutional Petition before the Environment & Land Court in Kisumu in Constitutional Petition No. 8 of 2013 under Articles 40, 42, 69 and 70 of the Constitutions, inter alia, claiming that their rights to a clean and healthy environment guaranteed under Articles 42 and 43 of the Constitution, had been violated by the Respondents. They argued that these rights had been violated by the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents' actions of failing to discharge their constitutional and statutory mandate in ensuring the protection and enforcement of these rights. The Court was also invited to interrogate the nature and extent of these rights, the jurisdiction of the Court in adjudicating the same and the possible reliefs available to the 1st, 2nd and 3rd Petitioners.

3. The allegations made against the Respondents were robustly denied and in addition, Preliminary Objections were filed on 7th February 2019 by the 1st Respondent and on 8th March 2019 by the 6th Respondent, respectively. They essentially challenged the jurisdiction of the Environment & Land Court (ELC) inter alia, to hear and determine the issues before it, arguing that there were other available forums which were more suited and appropriate for the issues raised in the Petition to be determined. They contended that the Court had usurped the jurisdiction of statutorily instituted and legally mandated bodies, to wit, the National Environmental Tribunal and the National Environmental Complaints Committee, by arrogating upon itself the jurisdiction to hear and determine issues that were not within its purview.

4. In making a determination on the issue of the jurisdiction of the Court and in dismissing the Preliminary Objections by the 1st and 6th Respondents, Kibunja J on 31st July 2019 held at para. 15 inter alia;

> " That having come to the findings set out above, it is clear that the issues and prayers in this Petition are completely different from those in in the case of Michael Otieno Nyaguti & 5 others v. Kenya National Highway Authority & 5 others (supra) and Gabriel Ochong Oriwo & another v. Augustino Omwanda & another (supra), which could have been dealt through the forum prescribed in the statute. That the issues and prayers herein are more like in the case of Ken Kasinga v. Daniel Kiplangat Kirui & 5 others and the Court holds, as Munyao J did in that decision, that the Petitioners are properly before the Court with jurisdiction to hear and determine the environmental issues.
>
> The upshot of the foregoing is that the Court finds the preliminary objections raised by the 3rd Respondent and the Interested Party to be without merit and are dismissed with costs. That having dealt with the Preliminary Objections, the Court now turns to the Petition in the following paragraphs."

5. The learned Judge having determined that the Court was vested with the requite jurisdiction to hear and determine the Petition, then went on to determine the other issues raised on their merits and made a final determination in favour of the 1st, 2nd and 3rd Petitioners.

ii) Appeal No.153 of 2019 at Court of Appeal in Kisumu

6. Aggrieved by the decision and Judgment aforesaid, the 1st, 2nd, 3rd, 5th and 6th Respondents filed separate appeals to the Court of Appeal being Kisumu Civil Appeal No. 153 of 2019, Kisumu Civil Appeal No. 162 of 2019, Kisumu Civil Appeal No. 187 of 2019, Kisumu Civil Appeal No. 188 of 2019, Kisumu Civil Appeal No. 189 of 2019 and Kisumu Civil Appeal No. 367 of 2019. These appeals were consolidated by consent of the parties on 2nd October 2019. The grounds adduced in the appeals were that the learned Judge of the superior Court had erred in determining and holding that the Court had jurisdiction to hear and determine the Petition and therefore usurping the jurisdiction of the National Environmental Tribunal and the National Environmental Complaints Committee.

7. They further argued that the learned Judge of the ELC erred in failing to adhere to the principle of exhaustion which provides for the need to explore all other available mechanisms in dispute resolution before proceeding to the Courts. They cited various authorities in line with their arguments that where there are clear procedures of redress of any particular grievance prescribed by the Constitution or statute, then the procedure should be strictly followed and adhered to.

8. The 1st, 2nd, 3rd, 5th and 6th Respondents further contended that the learned Judge erred in cancelling the Environmental Impact Assessment Licenses issued by the 4th Respondent to the 1st Respondent, and, that the learned Judge erred in issuing demolition orders of the 1st Respondent's structures without evidence of pollution as alleged by the 1st, 2nd and 3rd Petitioners.

9. In setting out the issues for determination, the Court of Appeal highlighted the issue of jurisdiction of the ELC vis-a-vis the National Environmental Tribunal or the National Environmental Complaints Committee to hear and determine the dispute between the parties. In rendering his decision on the issue, Asike-Makhandia JA stated that;

> " In the instant matter, the learned Judge citing the case of Ken Kasinga v. Daniel Kiplangat Kirui & 5 others [2015] eKLR, and other decisions from Courts of coordinate jurisdiction,

held that where a claim in a Petition or suit is multifaceted, a Court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of the law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting pleadings – that all that a litigant needs to do is draft pleadings that such claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping." [Page. 50].

10. The learned Judge further held that;

> " To this extent, I find that the learned Judge erred in law in finding that the ELC had jurisdiction simply because some of the payers in the Petition were outside the jurisdiction of the Tribunal or the National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a Court or oust jurisdiction of a competent organ through the art and craft of drafting pleadings. Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a Court or body to hear and determine all and sundry disputes. Original jurisdiction only means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta in Speaker of the National Assembly v. James Njenga Karume [1992] eKLR where it was stated that where there is a clear procedure for the redress of a particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.
>
> [...] 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 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 of conferment of jurisdiction to any Court or statutory body." [Pages. 51 - 52].

11. The learned appellate Judge, upon finding that the learned Judge writing for the Court of Appeal had erred in finding that the superior Court had jurisdiction to hear and determine the Petition, went on to review the other issues, holding inter alia, that the learned Judge erred in cancelling the licenses issued to the 1st, 2nd and 3rd Respondents and retroactively applying the provisions of Section 58(2) of the Environmental Management & Coordination Act, 2015 amendments to the dispute between the parties. The Court of Appeal then went on to allow the appeal and set aside in its entirety the judgment, declaratory orders and decree of the ELC delivered on 31st July 2019.

iii) Petition No. 3 of 2020 at the Supreme Court

12. Aggrieved by the judgement and decision of the appellate Court delivered on 31st January 2020, the 1st, 2nd and 3rd Petitioners lodged their Petition of Appeal dated 13th March 2020. In the grounds of the appeal at para. D of the Petition (pgs. 31-33), the Petitioners allege that the appellate Court erred in failing to find that the ELC has original jurisdiction under Sections 3 of EMCA, Sections 13(1), (2)(e) and (3) of the ELC Act as well as Articles 22, 23, 70, 165(3) and 258 of the Constitution.

13. They further fault the appellate Court for failing to make a distinction between jurisdiction and discretion, and failing to appreciate that the existence of statutory remedies under the EMCA is not a jurisdictional bar but a doctrine of judicial abstention under which the ELC had the discretion to determine whether or not to entertain proceedings before it.

14. They also contend that the appellate Court misapprehended and misapplied the decision of the Speaker of the National Assembly v. James Njenga Karume (supra) which was to the effect that the alternative means of dispute resolution notwithstanding, a party can still maintain a Court action regardless of the unexplored alternative remedy contrary to the findings by the said Court.

iv) 1st, 2nd & 3rd Respondents' Preliminary Objection and submissions

15. The 1st, 2nd and 3rd Respondents filed their Preliminary Objection dated 4th April 2020 on 30th April 2020. Their contention is that the Petitioner's Petition dated 16th March 2020 is not founded on the interpretation or application of the Constitution and therefore no appeal lies before this Court as a matter of right under Article 163(4)(a) of the Constitution. They further contend that there is no issue of constitutional controversy raised in the Petition and that the Petitioners are merely dissatisfied with the judgment of the Court of Appeal in Civil Appeal No. 153 of 2019. They also argue that the Petition is incompetent, bad in law, misconceived and an abuse of this Court's processes and should therefore be dismissed.

16. In their submissions filed on even date, they submit that the instant Petition is premised on a question of statutory interpretation and not a question of constitutional interpretation or application and that there are no cogent issues of constitutional controversy raised to warrant intervention by this Court.

17. They further submit that this Court lacks the jurisdiction to hear and determine this Petition as it seeks an interpretation of Section 3 of the Environmental and Management and Coordination Act, 1999 as read with Sections 13(1), (2)(e) & (3) of the Environmental and Land Court Act on the jurisdiction of the Superior Court in hear and determine the Petition filed before it.

18. Furthermore, they also submit that, even though there were constitutional questions that were determined by the Court of Appeal, to wit, the right to fair hearing under Article 50 and that the Petition did not meet the threshold set out in Anarita Karimi Njeru v. R (1979) eKLR, the same have not been appealed against by any of the parties, and therefore, no questions of constitutional controversy arises before this Court.

19. The 1st, 2nd and 3rd Respondents also submit that as enunciated in Musa Cherutich Sirma v. Independent Electoral & Boundaries Commission & 2 others [2019] eKLR, their dissatisfaction with the decision by the Court of Appeal cannot be elevated into a question of constitutional interpretation or application.

v) 5th Respondent's Preliminary Objection and submissions

20. The 5th Respondent contends that this Court lacks jurisdiction to hear and determine the instant Petition under Article 163(4)(a) of the Constitution. It further contends that the Petition is limited and confined to the interpretation and application of the Environment and Management and Coordination Act, 1999 and the Environment and Land Court, 2012. It contends that the Petition does not meet the constitutional muster on appeals under Article 163(4)(a) of the Constitution as laid down in Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another [2018] eKLR. It also argues that the Petition is violative of the doctrine of exhaustion and contravenes Article 159(2)(e) of the Constitution.

21. In submissions dated 6th May 2020 and filed on 7th May 2020, the 5th Respondent submits that this Court derives its appellate jurisdiction under Article 163(3), (4) & (6) of the Constitution, as read together with Sections 12, 13 & 14 of the Supreme Court Act. It thus submits that for a matter to be admissible to this Court as an appeal from the judgment and decision of the Court of Appeal, it has to be an issue founded upon cogent issues of constitutional controversy, or that the Court's reasoning and the conclusions that led to the determination of the issue, can properly be said to have taken a trajectory of constitutional interpretation and application.

22. The 5th Respondent further submits that a party, in this instance the Petitioners, could not merely clothe their intended appeal as a question of constitutional interpretation and application (relying Rutongot Farm Ltd v. Kenya Forest Services & 3 others (2018) eKLR), and that by the mere fact that the Court of Appeal exercised its powers to review and re-evaluate the decision of the Superior Court, then the issue became one of constitutional interpretation and application (quoting Zebedeo John Opore v. Independent Electoral Boundaries Commission & 2 others (2018) eKLR).

23. It also submits that the issues in contention before the Court of Appeal were the jurisdiction of the Environment and Land Court to hear and determine the allegations before it. And that the appellate Court went on to find that the trial Court was not vested with the requisite jurisdiction to hear the matter; that it usurped the jurisdiction of both the National Environmental Complaints Committee and the Tribunal, which were the two institutions so properly established under statute to hear and determine the issues raised by the Petitioners herein.

24. In the submissions, the 5th Respondent adds that, as in Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others (2012) eKLR, there are no specific constitutional provisions that can be identified that formed the gist of the cause of action in the Court of Appeal, and, to show that the interpretation and application of the Constitution was integral and inextricable from the cause of action. In that context they relied on the cases of Nasra Ibrahim Ibren v. Independent Electoral & Boundaries Commission & 2 others (2018) eKLR and Musa Cherutich Sirma v. Independent Electoral & Boundaries Commission & 2 others (2019) eKLR where this Court held that the mere reference to the provisions of the Constitution does not trigger its jurisdiction, and that it must be demonstrated that the appellate Court erred and/or misinterpreted and/or misapplied the Constitution.

25. With regards to the issue of appropriate forum and status of the ELC, the 5th Respondent submits that the proper channel which the Petitioners should have followed was to refer the matter to the National Environmental Tribunal or the National Environmental Complaints Committee. They submit that the proper procedure in instituting the proceedings was not established as was enunciated in Speaker of the National Assembly v. James Njenga Karume (1992) eKLR and Geoffrey Muthinja Kabiru & 2 others v. Samuel Munga Henry & 1756 others (2015) eKLR.

vi) 6th Respondent's Preliminary Objection and submissions

26. The 6th Respondent filed its Preliminary Objection dated 22nd May 2020 on 28th May 2020. In its challenge on the jurisdiction of this Court to hear and determine the Petition, the 6th Respondent argues that the appeal as set out does not deal with the question of whether the Constitution was properly interpreted or applied in the ELC and the Court of Appeal.

27. It further argues that the appeal by the Petitioner does not involve either the interpretation or application of the Constitution, nor does it raise issues of law or jurisprudential moment that deserves to be addressed by this Court. It thus argues that this Court lacks jurisdiction to hear and determine the instant Petition under the provisions of Articles 163(4)(a) of the Constitution as read together with Section 15 of the Supreme Court Act.

28. In its submissions filed on even date, the 6th Respondent, in furtherance of the arguments of the lack of jurisdiction of this Court, submits that the right of appeal to this Court has not crystallized as the issue of jurisdiction is not a constitutional issue which pertains to either the interpretation or application of the Constitution.

29. It also submits that both the Constitution and the Supreme Court Act confer jurisdiction on this Court, which jurisdiction should be guarded and exercised cautiously as specified by the Constitution and the law, and would only apply inter alia to matters that involve the application and interpretation of the Constitution. It further submits that matters which do not involve the interpretation or application of the Constitutions should not be allowed to transmute into issues pertaining to constitutional interrogation. It relies on the cases of Moses Mwicigi & 14 others v. Independent Electoral and Boundaries Commission & 5 others [2016] eKLR and Samuel Kamau Macharia v. Kenya Commercial Bank & 2 others (2012) eKLR in that regard.

30. The 6th Respondent lastly submits that the main issue in contention between the parties is the jurisdiction of the Superior Court and not the interpretation and/or application of the Constitution, and as such, the issues for determination should not be allowed to transmute into issues which invoke the jurisdiction of this Court if they were not in issue or in contention in the Superior Court as was determined in Bia Tosha Distributors Ltd v. Kenya Breweries Ltd & 6 others (2018) eKLR and Erad Suppliers & General Contractors Ltd v. National Cereals & Produce Board (2012) eKLR.

vii) 1st, 2nd and 3rd Petitioners' submissions in response to the 1st, 2nd, 3rd, 5th and 6th Respondents Preliminary Objections

31. In their submissions dated 11th June 2020 and filed on 12th June 2020, the 1st, 2nd and 3rd Petitioners submit that the grounds adduced in the Petition are conclusive to show that they warrant a hearing and determination by this Court under Article 163(4)(a) of the Constitution.

32. With regards to the issue of exhaustion of alternative remedies, they submit that the Respondents improperly seek to have the merits of the appeal determined by way of preliminary objection, and, also improperly elevate the status and powers of the National Environmental Tribunal and the National Environmental Complaints Committee. They submit that the question of the violation of the right to a clean and healthy environment guaranteed under Articles 42 and 70 of the Constitution could only be determined by the ELC and as such, since its jurisdiction was challenged there is therefore an issue of constitutional moment and was properly before this Court under Article 163(4)(a) of the Constitution.

C. Analysis and Determination

33. From the foregoing, it is clear that the only issue for determination is whether this Court has the jurisdiction to hear and determine the instant Petition. The issue of jurisdiction has been canvassed severally before this Court since its inception. Jurisprudence on the same has been established through a number of decisions that have come before it, and therefore, as we have done before, we shall not tire in re-stating that jurisprudence.

34. In R v. Karisa Chengo [2017] eKLR, this Court determined that;

> By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is

imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

35. Further, in Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others (supra), we held that;

> " A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

36. This principle has been replicated in a plethora of determinations by this Court, of common cause being that, a Court, even this Court, cannot arrogate itself jurisdiction through crafts of interpretation (see Interim Independent Electoral Commission Constitutional (Advisory Opinion) Application No. 2 of 2011) and a Court ought to exercise its powers strictly within the jurisdictional limits (Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others (supra)).

37. In Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another (supra), this Court determined that for an appeal to be said properly before it;

> " The appeal must originate from the Court of Appeal where issues for contestation revolved around 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. Where the case to be appealed had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4)(a). If an appeal is challenged at the preliminary level on grounds that it does not meet the threshold in Article 163(4)(a), the Court must determine that challenge before deciding whether to entertain the substantive appeal or not....It is the Court's duty as the ultimate custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold." [Emphasis added].

38. It is therefore evident that the issues that this Court would only exercise its jurisdiction over pursuant to Article 163(4)(a) of the Constitution are issues involving the interpretation or application of the Constitution, which constitutional issues had been considered and determined by the Superior Courts.

39. As it appears, the only issue of real controversy before this Court is the jurisdiction of the ELC to hear and determine a Petition that was filed by the Petitioners in Constitutional Petition No. 8 of 2018. The jurisdiction of the Court was challenged primarily on the premise that the Court had usurped the mandate of legislatively constituted bodies and conferred upon itself powers that it did not have. The challenge was therefore not on whether the Court had determined issued pertaining to constitutional dispensation, but whether the Court had that jurisdiction or power to hear and determine the Petition before it.

40. The challenge was not on the Court's mandate and powers as conferred upon it under Articles 70, 165(3) or 258 of the Constitution, but whether it had the powers to adjudicate on the issues presented before it pursuant to the provisions of the Environmental Management & Coordination Act, 2015.

41. In Mukisa Biscuits Manufacturing Company Limited v. West End Distributors (1969) E.A. 696 Law JA stated;

> " 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 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." [Emphasis added].

42. Following the above edict and in determining whether this Court has the jurisdiction to hear and determine the instant Petition, we need not delve into the realm of disputed facts, but restrict ourselves within the confines of the law. In determining such issues, such as jurisdiction, the only relevant issue to consider is the law, and nothing else. Turning to the issue at hand therefore, is the objection to the jurisdiction of this Court confined to issues of law with regards to the interpretation or application of the Constitution?

43. Whilst it may be argued that the issue of jurisdiction of the Environment and Land Court is a constitutional question given that the Court is established by dint of Article 162(2)(b) of the Constitution, and through legislative enactment of the Sections 4 and 13 of the Environment and Land Court Act, 2011, that was however not the issue in contention before the superior Courts below.

44. In the ELC, the Court held that it had the jurisdiction to hear and determine the Petition, not by dint of powers conferred upon it by Article 162(2)(b) of the Constitution or Sections 4 & 13 of the Environment and Land Court Act, 2011, but by dint of the provisions of the Environmental Management & Coordination Act, and more particularly, Sections 129(1) and 130 thereof. The Court then went on to justify its usurpation of the mandate of the National Environmental Tribunal and the National Environmental Complaints Committee, by citing Articles 23, 42, 47, 69 & 70 of the Constitution. The Court as was stated by the Court of Appeal contradicted itself by determining that some of the issues that were before it could be properly ventilated before the other legislatively mandated tribunals under the Environmental Management & Coordination Act, but chose to rather strangely arrogate upon itself the mandate to hear and determine those same issues.

45. On its part, the appellate Court made a categorical finding that the Court did not have the jurisdiction to hear and determine the Petition, not pursuant to constitutional conferment of jurisdiction, but that the Court did not have the mandate to determine issues that could have been adjudicated in other appropriate forums. On the issue of jurisdiction, which the Petitioners argue is nonetheless a constitutional issue, the appellate Court made no reference to the Constitution, but relied on the provisions of Sections 129(1), (3), 130, 130(5) of the Environmental Management & Coordination Act in allowing the appeal.

46. There was thus no determination made by any of the Superior Courts with regards to the jurisdiction of the Environment and Land Court in reference to the Constitution. In both their determinations on the issue of jurisdiction, they relied solely on the provisions of the Environmental Management & Coordination Act, with peripheral reference to the Constitution to buttress their decisions. It is manifestly evident from the foregoing that, where the interpretation or application of the Constitution has only but a limited bearing on the merits of the main cause, then the jurisdiction of this Court may not be properly invoked. (See Erad Supplies and General Contractors Ltd v. National Cereals & Produce Board (supra)).

47. Further, in Stanley Mombo Amuti v. Ethics and Anti-Corruption Commission [2020] eKLR, we observed that;

> "In Erad, we specifically stated that where the interpretation or application of the Constitution has only but a limited bearing on the merits of the main cause, then the jurisdiction of this Court may not be properly invoked. Indeed, in Aviation and Allied Workers Union (supra) we added that the mere reference to the rich generality of constitutional principle as the Court of Appeal did in the present case, is not a sufficient ground to invoke Article 163(4)(a). The same must be said of the present cause.
>
> It is thus our finding in the above context that reference to Articles 40 and 50 of the Constitution were introduced by the Appellant at the Court of Appeal and even then, peripherally so. The Court of Appeal thereafter rendered itself in passing only and the bulk of its Judgment was saved to an evaluation of the evidence on record in the context of Sections 26 and 55 of ACECA and not the Constitution per se." [paras. 17 & 18].

48. Both Superior Courts, in our view, therefore made determinations primarily on an interrogation and adjudication of statutory provisions and minimal reference to the Constitution. It cannot thus be said that the issues were determined in consideration and pursuant to the interpretation or application of the Constitution to therefore warrant an appeal to this Court under Article 163(4)(a) of the Constitution.

D. Appropriate Reliefs

49. As was also noted by the Petitioners, the issue of jurisdiction and discretion are distinct. Be as it may, the two are nonetheless inextricably intertwined; it would seem incongruous to discuss one without referring to or including the other. Such is the extent that these two quite seemingly innocuous terms are referred to quite often, and rather mistakenly, interchangeably. But for purposes of this present issue, jurisdiction, as referred to by the Petitioners, would denote whether the adjudicatory body has the power to entertain the proceedings and, discretion, to be whether such, upon determination that it has such powers, chose to exercise such powers or not.

50. It would therefore seem that the Superior Court, determined, quite incorrectly, that it had the power or jurisdiction to hear and determine the Petition, which although raised issues that were clearly within its purview, were also intertwined with other issues which were rather obviously not within its jurisdiction, and which could have been effectively determined by another legislatively established tribunal, in this instance two bodies, the National Environmental Tribunal and the National Environmental Complaints Committee.

51. The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted issues could be determined by the Court "in the interests of justice." It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised it discretion to hear and determine the Petition.

52. 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.

53. The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the State Court makes a ruling on the issue.

54 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.

55. The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.

E. Disposition

56. Having considered the three preliminary objections by the 1st, 2nd, 3rd, 5th and 6th Respondents as well as submissions, and the submissions by the Petitioners, we make the following orders;

    (a) The Preliminary Objections by the 1st, 2nd, 3rd, 5th and 6th Respondents are hereby upheld

    (b) The Petition is hereby struck out save that, noting the nature of the matter, the Petitioners are at liberty to pursue their claims at the appropriate forum, taking guidance from this Judgment and that of the Court of Appeal.

    (c) Each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2020.

.....

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA