



REPUBLIC OF KENYA

THE SUPREME COURT OF KENYA

ABIDHA NICHOLUS v. THE ATTORNEY GENERAL & 7 OTHERS & NATIONAL ENVIRONMENTAL COMPLAINTS COMMITTEE & 5 OTHERS (INTERESTED PARTIES)

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

SC PETITION NO. E007 OF 2023

DATE OF JUDGMENT: 28TH DECEMBER, 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court allowed the appeal and remitted the matter to the Environment and Land Court (ELC) at Kisumu for determination on a priority basis with each party bearing its own costs at the ELC, Court of Appeal and the Supreme Court.

Background

The appellant is the registered proprietor of L.R No. Siaya/Ramba/788 and also has interest in the lower parts of L.R No. Siaya/Ramba/719 and 720, both bordering River Odundu, Ramba in Rarieda Sub-County within Siaya County. The appellant's core complaint was that in 2019, the 2nd and 3rd respondents commenced mining operations in Ramba area including on L.R No. Siaya/Ramba/716 without obtaining licenses/permits or authorizations from the responsible government agencies. The appellant raised his concerns on the lack of authorizations and the resultant environmental damage caused by the 2nd and 3rd respondent's mining activities but were ignored by them. Subsequently, the appellant wrote to the Ministry of Petroleum and Mining, Ministry of Environment and Forestry and National Environmental Management Authority (NEMA) invoking Article 35 (1) of the Constitution, requesting information about the mining activities in Ramba area. The letter did not elicit any response.

Undeterred, the appellant wrote to the Commission on Administrative of Justice who then demanded an explanation from the Cabinet Secretary, Ministry of Petroleum and Mining, Cabinet Ministry, Environment, Climate Change and Forestry and NEMA on the issues raised by the appellant in his letter to them. This prompted NEMA to respond confirming that the mining activities by the 2nd and 3rd respondents in Ramba area were illegal and consequently issued stop orders directed at the said respondents. Despite the stop orders from NEMA, the 2nd and 3rd

respondents continued to prospect for minerals in the Ramba area. Furthermore, according to the appellant, the 2nd, 3rd and 8th respondents trespassed onto his property and erected electricity poles thereon, without his consent. The 2nd and 3rd respondent also continued to dump waste and effluent from their mining shaft on L.R No. Siaya/Ramba/788 as well as L.R Nos. Siaya/Ramba/719 and 720 posing health risks. They also positioned their agents and workers to process ore/ and or gold mining on nearby parcels of land which overflow into the subject land and also drain waste into River Odundu without taking any safety precautions or measures.

Aggrieved by all the above actions, the appellant filed before the Environment and Land Court (ELC) Kisumu **Petition No. 7 of 2020** where he claimed violation of various constitutional rights and statutory provisions including 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. The trial court struck out the appellant's petition for want of jurisdiction on *inter alia* that the issues raised in the appellant's petition fell within the jurisdiction of NEMA and the Energy and Petroleum Regulatory Authority (EPRA) and not the ELC at the first instance. Aggrieved by the decision of the trial court, the appellant appealed to the Court of Appeal which upheld the decision of the trial court. Aggrieved by the Court of Appeal's decision, he filed the present appeal before the Supreme Court. The Supreme Court delineated the following issues for determination:

- 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 had 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?*

Upon consideration of the same, the Supreme Court has allowed the appeal and determined as follows:

- 1. The appellant correctly invoked this Court's jurisdiction to determine the appeal.**
 - 2. The appellant raised issues of constitutional violations in his petition before the ELC and neither NET, EPRA nor EPT have jurisdiction to determine the alleged violations and therefore, the appellant was not required in such circumstances to exhaust the alternative dispute resolution mechanisms under EMCA and the Energy Act before filing his constitutional petition at the ELC.**
 - 3. The appellant could not amend his petition once a preliminary objection was raised as when successful, the preliminary objection may have disposed of the petition as it did in the instant case.**
 - 4. The ELC is the best forum to grant redress to the appellant's grievances as the remedies of appealing to NEMA and EPRA are not efficacious and adequate in the present circumstances.**
 - 5. The matter shall be remitted to and be heard at the ELC in Kisumu other than by *Ombwayo, J.***
 - 6. Each party will bear their costs at the ELC, Court of Appeal and this court.**
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