



**Mwangi & 844 others (Residents in Bangladesh and Kibarani Informal Settlements)
v Kenya Power & Lighting Company Limited & another (Constitutional
Petition 8 of 2022) [2022] KEELC 15455 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 8 OF 2022
LL NAIKUNI, J
DECEMBER 9, 2022**

BETWEEN

**PAUL MWANGI 1ST PETITIONER
JANE KANYUA 2ND PETITIONER
JOHN MUKARIA 3RD PETITIONER
EMMACULATE ADHIAMBO ONYANGO 4TH PETITIONER
PETER NYONGESA SIMIYU 5TH PETITIONER
MICHAEL ONYANGO MUSEWE & 839 OTHERS 6TH PETITIONER
RESIDENTS IN BANGLADESH AND KIBARANI INFORMAL SETTLEMENTS**

AND

**KENYA POWER & LIGHTING COMPANY LIMITED 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

RULING

I. Introduction

1. What is before this honorable court for its determination is a notice of preliminary objection filed and dated on March 30, 2022 by the 1st respondent/objector herein. Essentially, the 1st respondent holds that this honorable court lacks jurisdiction to hear and determine the application and the main petition herein.
2. Before embarking on the matters of the objection, the honorable court wishes to extrapolate though briefly on the background of this matter. On March 2, 2022, the petitioners herein filed a notice



of motion application dated March 1, 2022 and the petition dated March 2, 2022 before this honorable court for its determination. It was brought under rule 20 and 21 of the *Constitution of Kenya (Supervisory Jurisdiction and Protection of fundamental rights and freedoms of individuals) High Court Practice Rules* and the provisions of articles 19, 20, 21, 22 and 23 of the *Constitution of Kenya* and sections 7 and 19 of the sixth schedule. The orders sought by the petitioners were;

- a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to issue a conservatory order in the form of an injunction to restrain the respondent either by themselves or through their agents, servants, proxies, employees, acolytes and/or accomplices from in any way interfering with, forcefully evicting, demolishing, causing damage, obstructing and/or in any other way interfering with the petitioners continued occupation of the Kibarani and Bangladesh informal settlements within Mombasa county and or its buildings or causing the amelioration or negative waste degradation and damage of their environment and structures in purported implementation of the forceful eviction of the petitioners pursuant to the letter/notice dated February 10, 2022 or any other letter or notice serving the same purpose and after the hearing of the application interparties pending the hearing and determination of the constitutional petition herein.
3. The application is supported by the affidavit of Paul Mwangi the 1st petitioner. He deponed that in the years 2000 and 2017 the 1st respondent/objector installed power lines through Kibarani and Bangladesh areas through the last mile electricity connectivity which supplied electricity to the households in the settlements. In 2019, the 1st respondent/objector demanded that the petitioners' leave the areas as they had constructed their houses on the electricity wayleave. He deponed that the respondents assured the petitioners that they would be notified before the evictions, compensated for any loss and resettled in a new place. He argued that this create a legitimate expectation that the respondents would adhere to International Covenant and Treaties, land laws and regulations on forceful evictions. The threats to evict were again made in 2021 by the Minister for Interior and internal security during a roadside declaration that all the settlements perceived to be in the wayleaves should be demolished.
 4. The said evictions threats was actioned by the 1st respondent/objector who on February 10, 2022 issued a public notice, which is annexed and marked as "PM – 2". The notice was addressing members of the public who were said to be infringing on the powerlines 132KV/33KV powerlines from Rabai TP Kipevu at Mikidani /Jomvu/Miritini/Bangladesh/Kaa Chonjo area, by constructing buildings within the wayleaves trace which interferes with the operations and maintenance of the powerlines. The petitioners/respondents were given seven day to remove the said structures, failure to which the 1st respondent/objector threatened to demolish the encroaching structures and take legal action against them.
 5. The deponent argue that the 7 day notice is unreasonable, unfair, and unconstitutional and contravenes international conventions on evictions and forceful evictions. He deponed that the petitioners' occupation of the informal settlements preceded the powerlines, therefore they should not be evicted based on a blanket eviction order covering the entire settlement scheme. He argued that the respondents ought to act in a fair administrative manner and demarcate the wayleave and issue specific notices to the occupants of those areas as opposed to evicting the whole settlement. The deponent pleaded that there was no transparency, openness, accountability or public participation in reaching the decision to forcefully evict the petitioners/respondents through the eviction notice of February 10,



2022. He urged court to find that the forceful evictions are unfair, oppressive, and arbitrary and deny the petitioners/respondents right to fair hearing and urged court to grant conservatory orders.

II. The Notice of Preliminary Objection by the 1st Respondent/Objector

6. On May 5, 2022, the 1st respondent/objector responded to the application by opposing it through grounds of opposition and a notice of preliminary objection both filed and dated on March 30, 2022. The preliminary objection was on the ground that this honorable court lacks jurisdiction to hear and determine the application and the main petition herein as they offend section 3 (1), 10, 11(e), (f), (i), (k), & (l), 23, 24, 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 together with article 159 (2) (c) and 169 (1)(d) and (2) of the Constitution of Kenya 2010 and sections 9 (2) and (3) of the Fair and Administrative Act 2015.
7. The eleven (11) pointer grounds of opposition were based on the ground that:-
 - a. The application is misconceived, bad in law, defective, premature and legally untenable;
 - b. It never met the conditions set out in the case of “*Giella – versus - Cassman Brown*” neither have the petitioners/respondents proved legal ownership to the suit property.
 - c. The application was not a constitutional petition but rather a suit on infringement of the 1st respondent/objector’s wayleave trace.
 - d. The 1st respondent/objector maintained that other than the petitioners/respondents lacking “locus standi” to institute the petition, they are oblivious of the dangers posed by infringing on the 1st respondent/objector’s wayleave trace which carries high tension power lines, which was an offence under the Energy Act.

The court was urged to find the application as frivolous, an abuse of the court process and ought to be dismissed with costs.

III. Submissions

8. On May 17, 2022 while in the presence of all the parties herein, the court directed that the preliminary objection dated March 30, 2022 by the 1st respondent/objector be canvassed by way of written submissions with stringent timelines. Following that, all the parties fully complied and subsequently, the honorable court reserved time for the delivery of its ruling accordingly.

A. The written submissions by the 1st respondent/objector

9. On June 13, 2022, the Learned Counsel for the 1st respondent/objector, the law firm of Messrs Justus Ododa Advocates filed their written submissions dated the June 13, 2022 in support of their notice of preliminary objection. Mr Ododa Advocate submitted that the court has no jurisdiction to hear and determine the main petition whose main issue was the intended eviction of the it his argument, the Counsel relied on the cases of: “Owners of Motor Vehicle Vessel “Lillian S” - versus – Caltex Oil Kenya Limited (1989) eKLR”, “Joseph Njuguna Mwaura & 2 others – versus – Republic (2013) eKLR”; “Equity bank Limited – versus – Bruce Mutie Mutuku t/a Diani Tours & Travels (2016) eKLR”; “Phoenix of EA Assurance Company Limited – versus – SM Thiga t/a Newspaper Service (2019) eKLR and “Benard Nyakundi Osugo – versus - Kenya Power Limited (2021) eKLR, where the court found that jurisdiction was everything and once a court had no jurisdiction had no powers to continue with the proceedings but to put down its tools. Further that where there were disputes relating to billing and disconnection are best placed before Energy and Petroleum Regulatory Authority in order exhaust



the dispute resolution mechanisms set out in section 160 (3) of the [Energy Act 2019](#) and the [Energy \(Complaints and Dispute Resolution\) Regulations 2012](#).

10. The Counsel submitted that the dispute herein should be heard by the Energy and Petroleum Regulatory Authority a creation of the [Energy Act](#). Section 3 of the [Energy Act](#), provides that disputes relating to the distribution, supply and use electrical energy as well as all works and apparatus ought to be determined as per the Act and that the Act will prevail over any other Act of Parliament. The Counsel submitted that section 11 of the [Energy Act](#) provides that the Authority has power to investigate and determine complaints and disputes between parties as well as making and enforcing directions to ensure compliance with the Act. Counsel further argued that following the gazettment of the [Energy \(complaints and Dispute Resolution\) Regulations 2012](#), the Authority has jurisdiction to handle the dispute filed herein as opposed to this court.
11. The Counsel contended that the 1st respondent/objector in exercising its powers and undertaking its duties under the [Energy Act, 2019](#) intends to evict the petitioners along its wayleaves trace. The Counsel argued that the case herein is a civil action against the 1st respondent/objector, since it's a review against the intended action of the 1st respondent/objector. The Counsel urged that section 9 of the [Fair Administrative Action Act, 2015](#) is mandatory terms where this court is stripped of jurisdiction to hear matter where alternative dispute resolution mechanism have not been exhausted. The Counsel relied on the cases of "[Night Rose Cosmetics \(1972\) Ltd versus – Nairobi County Government & 2 others](#) (2018) eKLR"; "[Mutanga Tea & Company Ltd – versus – Shikara Limited & another](#) (2015)", "[Republic – versus - Energy Regulatory Commission & 2 others](#) (2018) eKLR where it was held that, "article 159 of the Constitution imposes on the judiciary the obligation to promote alternative dispute resolution hence the utilization of tribunals such as the Energy Tribunal falls within this objective... where a statute provides for a mode of resolving a dispute that procedure must be followed."
12. Additionally, the court found that such alternative dispute resolution mechanism normally had the advantage of ensuring that the issues in dispute were heard by experts in the area. Further, that the dispute were resolved much expeditiously and in a more cost effective manner. The Counsel submitted that the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal are comprised in matters of energy as set out in the provision of sections 26, 10, 11, 12 and 13 of the [Energy Act](#), hence the filing of this matter herein is an abuse of the court process. The Counsel argued that from the foregoing provisions, it was certain that there were clear dispute resolution mechanisms available under the [Energy Act, 2019](#) which ought too be followed. Here, to support his point he cited the cases of: "[Cyrus Komo Njoroge – versus – Kiringa Njoroge Gachoka & 2 others](#) (2015)", "[Speaker of national Assembly – versus – Njenga Karume](#) (1992) 1KLR, 425, where the Court of Appeal held:-

"There was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should have ben strictly followed"
13. The Counsel argued that the tribunal has jurisdiction to grant equitable reliefs including injunctions, penalties, damages and order of specific performance. The Counsel further relied on the case of "[Thomas Schering – versus - Nereah Micheal Said & 3 others](#) (2019) eKLR, where it was held that:- "From the provisions of the Energy Act, it is apparent that parliament in its wisdom wanted such disputes to be taken away from the mainstream courts to be handled by a specialized body known as the Energy Regulatory Commission." While in the case of:- "[Kenya Power & Lighting Co Limited – versus - Samule Mandere Ogeto](#) (2018) eKLR", Majanja J applied section 61 (3) of the [Energy Act](#) (repealed) to find that:- "Flowing from the provisions I have cited, I hold that any disconnection whether illegal or otherwise falls within the scope of disputes to be referred to the ERC".



14. In conclusion, the Counsel urged the honorable court to find that under the provision of section 36 of the Energy Act, this court has no jurisdiction to hear and determine or even grant the reliefs sought in the petition. The alternative judicial forum with jurisdiction was the Energy and Petroleum Tribunal. Hence, it should dismiss the said petition with costs to the 1st respondent/objector.

B. The written submissions by the petitioners/respondents

15. On July 25, 2022, the Learned Counsel for the petitioners/respondents the law firm of Messrs Jengo Associates filed written submissions dated July 21, 2022 in support of their application and as against the 1st respondent's preliminary objection dated March 30, 2022. Mr Jengo Advocate submitted that the filed submissions by the 1st respondent/objector was very convoluted and did not seem to clearly bring out the intended objection. However, the objection seemed to be stating that this court has no jurisdiction to here the case and that the petitioner's dispute ought to have been heard by the Energy and Petroleum Tribunal was not merited.
16. The Counsel based his argument from the provision of article 159 (2) (d) of the Constitution of Kenya and sections 1A and 1B of the Civil Procedure Act, cap 21 which provided that cases should be decided on their merits without due regard to technicalities. Further, he held that striking out of cases should be the very last resort where a case showed some semblance of life and not necessary whether the case would ultimately succeed or not but was arguable then it ought to be sustained. An action of striking out was so draconian. He cited the cases of "DT Dobbie – versus – Joseph Mbaria Muchina & another (1980) eKLR; "Maureen Waitthera Mwenje & another – versus – David Kinyanjui Njenga & 2 others (2021) eKLR and "Yaya Towers Limited – versus – Trade Bank Limited". The Counsel submitted that the petition herein pertains to the threatened violations of their constitutional rights as provided by article 23(1), 165(2)(b) and 162(2)(b) of the Constitution as read together with section 13 of the Environment & Land Court Act, No 19 of 2011. The Counsel submitted that the right not to be subjected to arbitrary evictions was a constitutional issue as held by the supreme court in the case of:- "Mitu – Bell Welfare Society – versus – Kenya Airports Authority & 2 others, Petition No 3 of 2018 (2021), KESC 34 KLR"; "William Musembi & 13 others – versus – Moi Educational centre Company limited & 3 others (2021) eKLR, where it was held that:- "It is an undeniable fact that forced evictions generally constitute a violation of fundamental rights and freedoms and an abuse of inherent human rights and dignity under article 43 of the Constitution"
17. The Counsel argued that for an eviction to take place there need a court order, and where an eviction is unconstitutional it is the court and not the Energy Tribunal that has the jurisdiction to stop of order for eviction.
18. The Counsel submitted that this court was clothed with the jurisdiction to interpret disputes to do with occupation and use of land which included matters of eviction as in the instant petition as provided for under the provision of article 162 (2)(b) of the Constitution of Kenya. Hence, he argued that it was the right forum to interpret the constitution on the issues touching on land occupation and evictions as the one before it in this petition. To buttress on this point, the Counsel cited several authorities which included:- "Attorney General & 2 others – versus – Okiya Omtata Okoiti & 14 others (2020) eKLR" where the Court of Appeal held:-

“We have no doubt that ELRC and ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in United States University (USIU) – Versus – The Attorney General & others (2012) eKLR and this court in “Daniel N Mugendi – versus - Kenyatta University & 3 others (2013) eKLR. However, the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like



that of High Court. It is limited to Constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters.

In the case of:- “[*Daniel Maingi Muchiri – versus – Jubilee Insurance Company Limited*](#) (2017) eKLR” court held:-

“The Environment and land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction”

“Karisa Chengo & 2 others, Petition No 5 of 2015” the Court held:-

“...we note that pursuant to article 162 (3) of the Constitution, Parliament enacted the Environment and land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdiction of the ELC and ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that special cadre of courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that ELC or ELRC is the High Court or the vice versa. The three are different and autonomous courts and exercise different and distinct jurisdiction. As article 165 (5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that ELC and ELRC too cannot hear matters reserved to the jurisdiction of High Court”.

19. The Counsel also cited the case of:- “ELC No 63 of 2017 – [*Christopher Ngusu Mulwa & 28 Others – versus – The County Government of Kitui & another*](#)” where the court held:-
20. Therefore, based on the above legal position, the Counsel strongly have filed their case has jurisdiction as it pertained to matters of violation, threat and denial of their fundamental rights to property. It was a dispute whereby even the Honorable Attorney General was sued and whom could never be subjected to a tribunal. So that even if the parts of the petition was to be struck out, the one issue that dealt with the Government of Kenya would have to remain which would cause having two issues running simultaneously both at the tribunal and this court a clear infringement of the doctrine of “sub – judice” which was not tenable.
21. The Counsel stated that the 1st respondent was misrepresenting the petition as a dispute between itself and the petitioners as its customers. The Counsel maintained that the real dispute is the threaten violation of the petitioners constitutional rights, as was affirmed by this court in the case of:- ”[*Ayadem Company Limited – versus - Kenya Power & lightning company*](#) (2017) eKLR, where it was held that:- “This court under section 13 of the ELC Act has the jurisdiction to hear and determine disputes alleging violations or infringements of fundamental rights under the constitution.”
22. Besides, the Counsel supposed assuming that indeed the matter was not a constitutional issue, he challenged the 1st respondent to point out which particular provision of the [*Energy Act*](#) that allowed the respondent to carry out arbitrary evictions so that the matter could be under the Act.
23. The upshot of the foregoing, the Counsel submitted that the preliminary objection by the 1st respondent/objector lacked merit and should be dismissed with costs.

IV. Analysis and Determination

24. Prior to embarking on the main issue and the reliefs sought from the main petition, there has been need to first and foremost dispose off the objection raised by the 1st respondent/objector through the



notice of preliminary objection dated March 30, 2022. In order to reach an informed, equitable and reasonable decision, the honorable court wishes to address itself on the following issues:

- a. Whether the objection raised through the notice of preliminary objection dated March 30, 2022 by the 1st respondent/objector meets the threshold required of such an objection by law and precedents.
- b. Whether the objection raised by the 1st respondent is sustainable.
- c. Who will meet the costs of the objection.

Issue No a). Whether the objection raised through the notice of preliminary objection dated March 30, 2022 by the 1st respondent/objector meets the threshold required of such an objection by law and precedents.

25. The 1st respondent/objector herein filed a notice of preliminary objection and this court felt it important that the objection be tackled as a matter of first priority. According to the [Black Law Dictionary](#) a preliminary objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co Limited – versus- West End Distributors Limited* [1969] EA 696 where Lord Charles Newbold P held that a proper preliminary objection constitutes a pure points of law. The learned judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

26. The court wishes to cite the case of “[Attorney General & another –versus- Andrew Mwaura Gitinji & another](#) [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection inter alia:-

- i. A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

27. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. The preliminary objection by the 1st respondent are on the following grounds:-



- a. That this honorable court lacks jurisdiction to hear and determine the application and the main petition herein;
 - b. That the court lacks the jurisdiction as the petition offends the provision of section 3 (1), 10, 11(e), (f), (i), (k), & (l), 23, 24, 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 together with article 159 (2) (c) and 169 (1)(d) and (2) of the [Constitution of Kenya 2010](#) and sections 9 (2) and (3) of the [Fair and Administrative Act 2015](#).
28. Certainly, the issues raised by the 1st respondent herein to the are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the 1st respondent were properly filed hereof. it constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of *Mukisa Biscuits Manufacturing Co Limited (supra)*. Therefore, I shall proceed to consider them and determine them accordingly.

Issue No b). Whether the objection raised by the 1st respondent is sustainable.

29. Before proceeding further, the court observes that the petitioners herein filed the main petition dated March 1, 2022 which sought for the following reliefs:
- a. A declaration that the petitioners, citizens, community rights under articles 10 (2)(b), 27, 28,29, 31, 32, 35, 40, 43, 47, 53, 54 and 55 of the [Constitution of the Republic of Kenya 2010](#) have not only been threatened with violation but have actually been violated and continue to be violated.
 - b. That this honourable court be pleased to issue a permanent prohibitory injunction to restrain the respondents either by themselves or through their agents, servants, proxies, employees, acolytes and/or accomplices from in any way interfering with, forcefully evicting, demolishing, causing damage, obstructing and/or in any other way interfering or continuing with violation of the petitioners right as intimated through the letter by the 1st respondent dated February 10, 2022.
 - c. A declaration that any eviction must conform to the provisions of the International Treaties and Conventions that Kenya has rectified and part 4 of the [Land Regulations 2017](#).
 - d. A declaration that any eviction must be preceded by a court order to that effect, provide an alternative settlement and compensation.
 - e. Damages for violation of petitioner’s rights.
 - f. Costs.
30. The petitioners claim arises out of the 1st respondent’s public notice letter dated February 10, 2022, addressed to members of the public who were said to be infringing on the power lines 132KV/33KV power lines from Rabai TP Kipevu at Mikidani /Jomvu/Miritini/Bangladesh/Kaa Chonjo area, by constructing buildings within the wayleaves trace. The letter demanded the petitioners to remove the said structures within seven days failure to which the 1st respondent threatened to demolish the encroaching structures and take legal action against them. The 1st respondents objects to the jurisdiction of this court and states that the Energy & Petroleum Regulatory Authority or in the alternative the Energy & Petroleum Tribunal.



31. It is now established that Jurisdiction is everything, when raised at any party to the petition, court has to make a determination on it before making any more step. A court cannot confer jurisdiction on itself, rather jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in "Samuel Kamau Macharia & another -versus - Kenya Commercial Bank Limited & 2 others (2012) eKLR, held that "A court's jurisdiction flows from either the constitution of 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. We agree with Counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."
32. The provision of section 25 of the Energy Act 2019 establishes the Energy and Petroleum Tribunal and section 36 provides for its jurisdiction, it states:-
1. The tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
 2. The jurisdiction of the tribunal shall not include the trial of any criminal offence.
 3. The tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
 4. The tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.
 5. The tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
 6. The tribunal shall hear and determine matters referred to it expeditiously."
33. Though the tribunal has jurisdiction to hear and determine all matters referred to it relating of the energy and petroleum sector arising from the Act, it is not conferred with jurisdiction to enforce rights and freedoms if they are threatened infringed. The petitioners claim against the respondents is that of threats to violate their human rights, articles 22, 23 and 162 (2)(b) of the Constitution confers this court with jurisdiction to hear and determine petitions for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment, the use, the occupation of, and title to land.
34. This court is a creation of article 162 (2) (b) of the Constitution, which establishes and confers this court with jurisdiction: "Parliament shall establish courts with the same status of the High Court to hear and determine disputes relating to - the environment and the use and occupation of, and title to land." The Environment and Land Court Act to give effect to article 162 (2) (b) of the Constitution and sets out the jurisdiction of the court in section 13 of the Environment & Land Act, No 19 of 2011 as follows:-
- "In exercise of its jurisdiction under article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes—
- 2.



- (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."

35. The other relevant provisions of the Statutes that confer this court with jurisdiction are sections 101 of the Land Registration Act, No 3 of 2012 and 150 of the Land Act, No 6 of 2012. The petitioner's claim of threatened eviction from the 1st respondent's wayleaves trace of the 132KV/33KV powerlines in Rabai TP Kipevu at Mikidani /Jomvu/Miritini/Bangladesh/Kaa Chonjo area; is, in my view an issue that raises various constitutional questions that can only be answered by this court. The petitioners claim that if the impending evictions are carried out, their constitutional rights to privacy, access to information, property, economic and social rights as well as their freedom from discrimination, right to dignity and fair administrative action will be infringed upon. This court is the forum to seek remedies for constitutional rights violated in the areas of land and environment as provided by section 21 of the ELC Act which empowers the court to exercise the jurisdiction under article 165(3)(b) or (d) of the Constitution which are:-

- "b. determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, and
 - a. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and



- v. any other jurisdiction, original or appellate, conferred on it by legislation."

In the long run, the court finds that this court is clothed with the jurisdiction to hear and determine this petition taking that there are numerous issues of violation, threat and denial of various fundamental rights and provisions of the *Constitution of Kenya, 2010* as enumerated above.

Issue No c) Who will meet the costs of the objection.

36. The Black Law Dictionary defines "cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

Ideally, it is trite law that issues of costs are at the discretion of the honorable court. The proviso under the provisions of section 27 (1) of the *Civil Procedure Act*, cap 21 holds that costs follow events. By events it means the results and outcome of any legal action, proceeding or process in any litigation. In the case of "*Reids Hewett & Company – versus – Joseph* AIR 1918 cal 717 & *Myres – versus – Defries* (1880) 5 Ex D 180, the House of the Lords noted:-

"The expression "costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

37. The events in the instant case is that the preliminary objection raised by the 1st respondent herein has failed. For that very reason, the 1st respondent herein will bear the costs of the objection to be awarded to the petitioners.

V. Conclusion & Disposition

38. The upshot of all this elaborate analysis to the objection raised by 1st respondent herein, that the honorable court wishes to proceed to make the following orders. These are:-
 - a. That notice of preliminary objection dated March 30, 2022 by the 1st respondent is devoid of merit and thus be and is hereby dismissed with costs to the petitioners.
 - b. That the honorable court herein has the jurisdiction to hear and determine disputes alleging threats, violation and denial to the fundamental rights and freedoms as provided for under article 162 (2) (b) of the *Constitution of Kenya, 2010* raised in this petition.
 - c. That for expediency sake, the main petition should be heard and determined within the next one hundred and eighty (180) days from the date of the delivery of this ruling. There should be a mention date on March 2, 2023 for purposes of fixing the hearing of:-
 - i. The notice of motion application by the petitioners dated May 1, 2022; and
 - ii. Taking directions on how to dispose off the petition – be by either affidavits and/or adducing of viva voce evidence hereof.
 - d. That the costs of the preliminary objection to be borne by the 1st respondent.

RULING DELIEVERD, SIGNED AND DATED AT MOMBASA ON THIS 9TH DECEMBER, 2022.



**HON. MR. JUSTICE L.L NAIKUNI (JUDGE),
ENVIRONMENT & LAND COURT AT, MOMBASA**

In the presence of:-

- a. M/s. Yumnah, the Court Assistant,
- b. Mr. Khamisi Salim Advocate holding brief for Mr. Jengo Advocate for the Petitioners/Respondents.
- c. No appearance for the 1st Respondent/Objector despite notices having been issued.
- d. No appearance for the 2nd Respondent

