



**Lococo & 2 others v Director of Public Prosecution & 10 others (Constitutional Petition E006 of 2024) [2024] KEHC 10488 (KLR) (29 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10488 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CONSTITUTIONAL PETITION E006 OF 2024**

**SM GITHINJI, J**

**AUGUST 29, 2024**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ARTICLES 2(4), 3, 10 (2), 19, 20, 21 (1), 22, 23, 25 (C), 28, 29, 31 (C), 35 (2), 39 (1) & (2) AND 157 (11) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF KILIFI SENIOR PRINCIPAL MAGISTRATE’S CRIMINAL CASE NO. E328 OF 2024 (R V DANIELLE LOCOCO & MASSIMO NATIVI)**

**AND**

**IN THE MATTER OF SUMMONS BY THE DCI NAIROBI REQUIRING DANIELE LOCOCO AND MASSIMO NATIVI TO ATTEND DCI KILIFI FOR QUESTIONING**

**BETWEEN**

**DANIELLE LOCOCO ..... 1<sup>ST</sup> PETITIONER**

**MASSIMO NATIVI ..... 2<sup>ND</sup> PETITIONER**

**RAFIKI LIMITED ..... 3<sup>RD</sup> PETITIONER**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**DAVID K. SIELE ..... 4<sup>TH</sup> RESPONDENT**

**COSIMO ARMENO MODUGNO ..... 5<sup>TH</sup> RESPONDENT**

**MARIA GRAZIA MOSCONE ..... 6<sup>TH</sup> RESPONDENT**



FLORENZO GIROLA .....	7 <sup>TH</sup> RESPONDENT
ROSY TETTAMANTI .....	8 <sup>TH</sup> RESPONDENT
RITA NAPPO .....	9 <sup>TH</sup> RESPONDENT
SENIOR RESIDENT MAGISTRATE, KILIFI .....	10 <sup>TH</sup> RESPONDENT
THE ATTORNEY GENERAL .....	11 <sup>TH</sup> RESPONDENT

## RULING

1. The Petitioners filed a petition dated 31/5/2024 seeking a total of 27 reliefs, the first four of which were declarations sought in relation to some preliminary agreements and leases over the villas dubbed Rafiki Village, constructed on Plot No. Kilifi/Jimba/1544 allegedly between the 3<sup>rd</sup> Petitioner and the 6<sup>th</sup>-9<sup>th</sup> Respondents. The other reliefs sought were in relation to the criminal proceedings conducted post-delivery of the said villas to the 6<sup>th</sup> -9<sup>th</sup> Respondents. Substantially, the Petitioners sought inter - alia damages for malicious prosecution; an order prohibiting the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and their officers from any further criminal investigations of the Petitioners and any matter arising from the sale and occupation of any villa at Rafiki Village; and that the 10<sup>th</sup> Respondent lacks jurisdiction to hear and determine the criminal case No. 328 of 2024 against the Petitioners.
2. The background of the Petitioners' case summed from the petition is that the 3<sup>rd</sup> Petitioner, as the lessor, sold to the 6<sup>th</sup> -9<sup>th</sup> Respondents villa 4A, 4B and 5A within Rafiki Village and handed over vacant possession of the same. However, due to some delay occasioned by the Land Registry, the 3<sup>rd</sup> Petitioner was unable to register the said Respondents' leases as planned. As a result, the said Respondents initiated criminal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, who are named as the directors of the 3<sup>rd</sup> Respondent, on charges of obtaining by false pretense and conspiracy to defraud. According to the Petitioners, the said charges were unfounded and the entire criminal process against them tainted with malice, incompetence, ignorance and violation of the *Constitution*.
3. Alongside the Petition, they filed a notice of motion application equally dated 31/5/2024, seeking interlocutory orders pending the determination of the petition.
4. In response to the above Petition and notice of motion, the 5<sup>th</sup>- 9<sup>th</sup> Respondents filed an undated notice of preliminary objection premised on the following grounds: -
  1. That this suit raised no reasonable cause of action within this honourable court's jurisdiction as spelt out under Article 162 (2) (b) of the *Constitution* of Kenya and under section 1 of the *ELC Act*.
  2. That the Applicant's application and petition both dated 31<sup>st</sup> May 2024 is frivolous, vexatious and abject abuse of court process in view of the fact that it does not meet the required threshold of a constitutional petition as held in the case of Anarita Karimi Njeru.
  3. That the instant application and petition is devoid of merit and is therefore for dismissal with costs.
5. The notice of preliminary objection is the subject of this ruling. Notably, when the matter came up in court on 30/7/2024, Mr. Kinyua, counsel for the Petitioners, argued the objection orally. He stated that the grounds of objection number 2 and 3 did not qualify to be raised as preliminary objections. He added that the dispute herein did not fall within the jurisdiction of the Environment and Land Court



(ELC) established under Article 162 (2) (b) of the Constitution, which grants that court jurisdiction over title, use and occupation of land. He stated that the issue of the ownership of the villas was active before the Mombasa Chief Magistrate Court and before the Malindi ELC Court. To him, the Petitioners herein seek protection against malicious prosecution, an issue which falls within the jurisdiction of the high court.

6. Mr. Ndegwa, counsel for 5<sup>th</sup> -9<sup>th</sup> Respondents urged the court to focus on the pleadings as filed. He argued that the prayers as framed in the petition show that the issue relates to land, and that the issue of malicious prosecution can only be raised after trial. In his written submissions dated 25/7/2024, counsel laid out the jurisdiction of both the High Court and the ELC provided in the Constitution under Article 162 (1), (2) (b) and Article 165 (1), (3) (b) and (d). He also cited section 4 (1) and 13 (2) of the ELC Act. He argued that as per the stated provisions, the Petitioners' case falls under the jurisdiction of the ELC and not the High Court.
7. To propound on what consists a preliminary objection, counsel cited the case of Dismas Wambola v CS, Treasury & 75 others [2017] eKLR; and the case of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 on the relevance of jurisdiction.

### Disposition

8. Having considered the points raised in objection and arguments preferred by both counsel, I frame the following issues for determination:-
  - i. Whether the Notice of Preliminary Objection raises pure points of law; and
  - ii. Whether this Court has jurisdiction to hear and determine the Petition.
9. The case of Mukisa Biscuits v West End Distributors Ltd (1969) E.A 696 defined a preliminary objection as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as 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 ...”

Justice Newbold in the said case argued that; -

“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 had to be ascertained or if what is sought is the exercise of judicial discretion”
10. The Respondents have based their Preliminary Objection on the ground that this court lacks jurisdiction to hear and determine the petition. No doubt, the issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This is because in any litigation, jurisdiction is central and a court of law cannot validly take any step without it. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. (See the Supreme Court's decision in the Matter of Interim Independent Electoral Commission [2011] eKLR).
11. Having said so, it behoves this court to determine whether or not this court lacks jurisdiction to hear and determine this Petition. According to the Respondents, the dispute in the Petition is related to



land, as such the proper court to approach would have been the ELC. To the Respondents, the nature of the orders sought are within the purview of that court.

12. Gikonyo J in *Dominic & 3 others v County Government of Narok & another* (Constitutional Petition E002 of 2023) [2023] KEHC 17908 (KLR) did a lengthy analysis on the issue of jurisdiction where the high court and the specialized courts are involved. The learned judge discussed:

“16. At the risk of sounding mundane, the jurisdiction of the specialized Courts in article 162(2) of the *Constitution* has been determined with finality in the famous *Karisa Chengo & 2 others v Republic case*. The Court of Appeal in *Karisa Chengo & 2 others v Republic* Civil Appeal Nos. 44, 45 & 76 of 2014 observed as follows: -

“The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in the *Constitution* for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment ... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in the *Constitution* of a statement on the status of the specialized Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court.....”

17. The matter was appealed to the Supreme Court in Petition No. 5 of 2015 Republic v. Karisa Chengo & 2 Others. The Supreme Court rendered itself as follows: -

“(50) ... Article 162(1) categorizes the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the *Constitution* intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialized Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another.



(51) .....

(52) In addition to the above, 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 jurisdictions of the ELC and the ELRC as stated above. From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with sui 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 either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. 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 the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.

(79) It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the *Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).”

18. The foregoing is the obtaining legal position.
19. The matter, however, does not end there. A further problem seem to arise. It was on the cases raising ‘cross-cutting’ or ‘cocktail’ or ‘mixed grill’ issues within either Courts.
20. Initially there were two schools of thought in the High Court on the matter. One school favoured the ‘pre-dominant purpose test’ whereas the other school rooted for the ‘pre-dominant issue or subject matter before Court test’.



21. The proponents of the former include Ngugi, J (as he then was) who rendered himself in *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another* as follows:

- “ 23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-Dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
24. The Court must first determine whether the predominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.”

22. My readings of Munyao, J below was not really an abrogation of the predominant purpose test, but an additional test as it is not in all cases the predominant purpose test is apt- especially in squirmy cases. In *Lydia Nyambura Mbugua v. Diamond Trust Bank Kenya Limited & Another* the Learned Judge argued as follows: -

- “ 25. .... On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of



land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.”

23. The Court of Appeal had an occasion and dealt with the issue. In *Co-operative Bank of Kenya Limited v. Patrick Kang’ethe Njuguna & 5 others*, the Court dealt with the issue as follows: -

“(30) Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine) which translates to ‘whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell’. As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well.....

(31) Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it.”

(35) ...[F]or land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted.

24. The Court of Appeal, therefore, settled for the ‘pre-dominant purpose test’.

25. The foregoing discussion is healthy, and noting the observations by Munyao J, there are scary-edge cases which may not totally or squarely fall within one or other of the tests proposed by the various courts I have analyzed.” (my emphasis).

13. I have perused the said petition and the reliefs sought therein; while I doubt that the first four prayers would fall within the jurisdiction of a constitutional court like the present one, I am convinced that the dominant issue in the Petition revolves around the prosecution of the Petitioners, and the alleged malicious prosecution for that matter.
14. Ordinarily constitutional issues arising out of criminal cases and involving claims for malicious prosecution have been filed before the High Court. I do therefore find that the High Court has jurisdiction to determine the claim for malicious prosecution. This falls within the jurisdiction of the High Court.
15. The Petitioners’ other claims involve declarations for violation of the *Constitution*, which must be proved at the hearing of the Petition. It matters not at this stage whether the Petition does not meet the threshold established in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR. This is an issue to be determined at the final hearing.



16. In the ultimate, I dismiss the notice of preliminary objection. Costs shall be in the cause.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29<sup>TH</sup> DAY OF AUGUST, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

1. Ms Muyaa holding brief for Kinyua for the Petitioners/Respondents.
2. Mr Mwangi for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents
3. Mr Ndegwa Njiru for 7<sup>th</sup> to the 9<sup>th</sup> Respondents/Applicants
4. Mr Ojwang for 10<sup>th</sup> and 11<sup>th</sup> Respondents

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**S.M. GITHINJI**

**JUDGE**

