



**Kitundu v Chief Land Registrar & 2 others (Petition E275 of 2023)
[2024] KEHC 11157 (KLR) (Constitutional and Human Rights) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E275 OF 2023
LN MUGAMBI, J
SEPTEMBER 26, 2024**

BETWEEN

ESTHER KATOSI KITUNDU PETITIONER

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The ruling is in relation to the 2nd Respondents' Notice of Preliminary Objection dated 15th September 2023 and the 1st and 3rd Respondents Notice of Preliminary Objection dated 23rd August 2023 against the Petition dated 26th July 2023.
2. The 2nd Respondent's Preliminary Objection is premised on the grounds that:
 - i. The Petitioner has filed this application prematurely as she has not exhausted the internal mechanisms set out in Section 14 of the *Access to information Act*.
 - ii. This Court lacks Jurisdiction by dint of Article 159(2) (c) of *the Constitution* which guides it to promote Alternative Dispute Resolution.
 - iii. The Petitioner did not disclose any question for determination before this Court neither does the Petition meet principles on pleadings in Constitution Petition.
 - iv. The Petitioner suit is incompetent misconceived and is otherwise an abuse of the due process of Court.



- v. The petition dated 26th July 2023 suit be dismissed with costs.
3. The 1st and 3rd Respondents' Preliminary Objection is premised on the grounds that:
- i. By dint of Article 165(5) of *the Constitution* the Court lacks the Jurisdiction to hear and determine the Petition dated 26th July 2023 herein since it is a dispute relating to the environment and the use and occupation of, and title to, land by virtue of the provisions of Article 165(5) of *the Constitution* which provides that "the High Court shall not have jurisdiction in respect of matters- (b) falling within the jurisdiction of the Court contemplated in Article 162(2).
 - ii. By dint of Section 13(2) of the *Environment and Land Court Act* No. 19 of 2011 which provides that the Environment and Land Court shall have original and appellant jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution*.
 - iii. By dint of Section 13(7) of the *Environment and Land Court Act* No. 19 of 2011 which provides that the Environment and Land Court can issue award of damages, orders for restriction and compensation, which provision if read together with the provisions of Article 162(2) of *the Constitution* which oust the jurisdiction of the Court to hear and determine this case.
 - iv. The petition did not disclose any constitutional questions for the determination by this Court neither does it meet the principles on pleadings in constitutional petitions as enunciated in *Anarita Karimi Njeru v Republic* [1979] 1 KLR 154 and augmented in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR.
 - v. The issues raised in this Petition can effectively be addressed in ELC 327 of 2021 by simply enjoining the relevant parties as per Order 1 Rule 3 of the Civil Procedure Rules, 2010.

2nd Respondent's Submissions

4. The 2nd Respondent in support of its case filed submissions dated 17th January 2024 through its Counsel, Ondieki A. Advocates. The 2nd Respondent identified the following two issues:
- i. whether this Court has the jurisdiction to hear this matter by virtue of Article 159(2) (c), 165(5) and Article 162(2) (b) of *the Constitution* and;
 - ii. whether the application discloses a reasonable cause of action against the 2nd Respondent.
5. On the first issue the 2nd Respondent relying on *Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited* (1989) KLR 1 and *Interim Independent Electoral Commission* (2011) eKLR submitted that this Court lacks jurisdiction to entertain the instant suit owing to the bar set out in Article 165 (5) of *the Constitution*. It submitted that the issues raised by the Petitioner belong to the Environment and Land Court established under Article 162(2) of *the Constitution* since it is a claim to determine the legal ownership of suit property Nairobi Block 83/14.
6. To buttress this point reliance was placed in *R. V. Karisa Chengo & 2 others* (2017) eKLR where the Supreme Court held that:

"Article 162 (1) categorizes ELC and ELRC among the superior courts and it may be inferred, the, that the drafters of *the Constitution* intended to delineate the roles of ELC & ELRC, for the purpose of achieving, specialization and conferring equality of the status of the High Court and the new category of courts. In addition to all these, 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 & ELRC. From reading *the Constitution* and these Acts of parliament, it is clear that a special cadre of courts, with *suis generis* jurisdiction, is provided for. Article 165 (5) precludes the High Court from entertaining matters reserved to the ELC & ELRC.....”

7. Like dependence was placed in *Lydia Nyambura Mbugua V. Diamond Trust Bank Kenya Limited & Another* (2018) eKLR.
8. Pertaining the second issue the 2nd Respondent submitted that the Petitioner’s claim does not outline a cause of action against the 2nd Respondent since the 2nd Respondent neither produces Green Cards nor is it involved in issuance of those cards. Placing reliance on Order 2 Rule 15 of the Civil Procedure Rules, the 2nd Respondent urged this Court to strike out the pleadings for failure to disclose a reasonable cause of action against the 2nd Respondent. Reliance was placed in *DT Dobie & Co. (K) V. Muchina* (1982) KLR, where the Court of Appeal explained reasonable caution of action as:

“An action with some chance of success when allegations in the Plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.”
9. Like dependence was also placed in *Crescent Construction Co. Ltd V Delphis Bank Ltd* [2007] eKLR.

1st and 3rd Submissions

10. In response to both Preliminary Objections, the 1st and the 3rd Respondents filed submissions dated 2nd January 2024 through State Counsel Wanja Wanjiru. The issues for determination were identified as: whether the Court has jurisdiction to hear and determine this matter by virtue of Article 165(5) of *the Constitution* and Article 162(2) (b) of *the Constitution* and whether the Court is divested of jurisdiction by the doctrine of exhaustion.
11. On the first issue, both respondents relied on *Owners of Motor Vessel ‘Lillian S’* (supra) in asserting that this Court lacks the requisite jurisdiction to entertain this matter. This is because Article 165 (5) of *the Constitution* bars this Court from entertaining matters reserved for the Special Courts under Article 162 (2) (b) of *the Constitution*. Reliance was placed in *Republic v National Land Commission Ex-Parte Ephraim Muriuki Wilson & others* [2018] eKLR where it was held that:

“The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2) (b) of *the Constitution* and Section 13 of the Act. In this regard, my view is that the intention in *the Constitution* is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction.”
12. Moreover, the 1st and 3rd Respondents contended that the Petitioner had failed to exhaust the procedure provided for in Section 14 of the *Access to Information Act*. They argued that Constitution obligates the Court under Article 159(2) of *the Constitution* to uphold alternative forms of dispute resolution. The case of *Martin Kabubii Mwangi v County Government of Laikipia* [2019] eKLR cited in support held as follows:

“The exhaustion principle enunciated in precedents such as the case of *Secretary, County Public Service & Another v Hulubhai Gedi Abdille Civil Appeal 202 of 2015* does not permit



an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the *County Governments Act*, the Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.”

13. Similar reliance was placed in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, *Peter Odour Ngoge v Francis Ole Kaparo & others; SC Petition No. 2 of 2012*, [2012] eKLR, *R vs Kenya Revenue Authority Ex-parte Style Industries Limited* (2019) eKLR and *Speaker of National Assembly v Karume* [1992] KLR 21.

Petitioner’s Submissions

14. The Respondents Preliminary Objections were opposed by the Petitioner in her submissions dated 20th March 2024 filed by Kinyua Mbaabu and Company Advocates.
15. To begin with Counsel relying in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* (1969) EA 696 stressed that a Preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Further that the same must raise a pure point of law, all the facts pleaded by other side be correct and that no fact needs to be ascertained as held by the Court of Appeal in *Attorney General and another vs Andrew Maina Gitbinji and one other in Civil Appeal No 21 of 2015*.
16. According to Counsel the Respondents Preliminary Objections fail this threshold. This is because a number of facts must be ascertained. First whether the Petitioner indeed exhausted all dispute resolutions mechanisms as per the laws, second, whether the 2nd Respondent is involved in the issuance of green cards and third, whether the 2nd Respondent is entitled to keep and what type of records they keep and third, whether they are entitled to release the said record to the Petitioner.
17. On whether this Court has jurisdiction to entertain this suit, the Petitioner submitted that the Court in ELC E327 of 2021; *Esther Katosi vs Musa Abdullahi* (2022)eKLR determined that only the High Court has unlimited jurisdiction and as such cannot make a determination in view of the provisions of the *Access to Information Act*. The Petitioner further argued that if the Preliminary Objection was to succeed on the basis of jurisdiction, the same would subject the Petitioner to great prejudice as two courts would be holding different positions to her detriment. She argued that Section 13 of the *Environment and Land Court Act* does not list access to information as one of the mandates of the Environment and Land Court in view of Article 35 of *the Constitution*.
18. On whether the Petitioner exhausted the available mechanisms, it was the Petitioner’s position that she had adduced evidence that she did indeed lodge a complaint with the Commission for Administrative Justice on 26th August 2022. The Commission wrote to the Respondents who remained unresponsive to the request for the information sought leading to the filing of the instant suit. Accordingly, failure to grant this information was argued to have infringed on the Petitioner’s right to access the information as held in Kenya Legal and Ethical Issues Network on *HIV & Aids (KELIN) v Cabinet Secretary, Ministry of Health & another; The Commission on Administrative Justice (Interested Party) (Petition E063 of 2021)* [2023] eKLR.



19. The Petitioner faulted the Respondents argument that the Petition does not raise a constitutional question. It was noted that the Petition clearly stipulates which provisions were infringed on by the Respondents. On whether a reasonable cause of action was raised against the 2nd Respondent, the Petitioner submitted that the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR guided that to discern any point of law, the Court has to be satisfied that there is no contest as to the facts presented before it. The Petitioner stated that a reading of the Petition and the 2nd Respondent's response made it clear that the facts were contested and thus require to be ascertained which defeats the essence of a preliminary objection.
20. Nonetheless it was argued that the Court of Appeal in *D.T Dobie & Company Ltd (supra)* guided that a Court can only strike out pleadings where a suit appears to be so hopeless and obviously discloses no cause of action.

Analysis and Determination

21. Having considered the pleadings and submissions of the parties herein, I find that there are two issues for determination namely:
 - i. Whether the Respondents' Preliminary Objections have met the requisite threshold.
 - ii. If so, whether the Preliminary Objections are merited.
22. The threshold of a preliminary objection was set out by the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd (supra)* as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”
23. The Court went further to note 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”
24. Likewise, the Court in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR noted that:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”



25. Equally, in *Oraro vs. Mbaja* [2005] 1 KLR on the nature of preliminary objections it was observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

26. The Preliminary Objections are founded on four major limbs all directed at the Court’s lack of jurisdiction to entertain the Petition. They are: Whether the instant Petition deals with land hence falling within the competence of the Environment and Land Court jurisdiction; whether the Petitioner exhausted the mechanism provided under Section 14 of the *Access to Information Act*; Whether the Petition raises a constitutional question and satisfies the Anarita Karimi threshold; and whether the Petition raises a reasonable cause of action against the 2nd Respondent.

27. The first question to answer is whether these issues are pure points of law.

28. I find no difficulty in answering this question. The first issue is premised on Article 165 (5) of *the Constitution* as read with Article 162 (2) (b) of *the Constitution*. This objection is founded in the law and not fact. The Court has to resort to the law to determine whether it has jurisdiction to entertain the matter. This was affirmed by the Supreme Court in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others* (2012) eKLR as follows:

“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. We agree with counsels for the first and second respondents in his submission 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 ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

29. The second issue relates to the doctrine of exhaustion. The Supreme Court in *Sammy Ndung’u Waity vs Independent Electoral & Boundaries Commission And 3 Others* (2019)eKLR discussed this principle as follows:

“(63) Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe



for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others*; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.”

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

30. My considered doctrine of exhaustion is equally point of law if it is based on uncontested facts. The issue is whether or not the Petitioner utilized the available statutory mechanism or not. If there is a contest on that fact, that is what will remove it from the realm of a preliminary objection. In this case, there is a contest on this fact as the Petitioner claims she approached the Commission on Administrative Justice to intervene so as to be supplied with information. That would call for ascertainment of that fact hence it is not therefore a pure point of law.
31. The 3rd issue, is that the Petition does not raise constitutional question and the failure satisfy the threshold set out in *Anarita Karimi Njeru* case in that case, the court stated as follows:

“If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
32. Evidently, this is a legal question that should be determined by examining the pleadings and no more. It therefore follows that the mere citing of constitutional provisions or general statements is not enough. A petitioner must identify the provisions that are alleged to be violated and show how the said provisions were violated from the facts and evidence of the case.
33. Lastly, it is argued that the Petition does not raise a reasonable cause of action against the 2nd Respondent. This element was defined in *Isaiah Ondiba Bitange & 3 others v Institute of Engineers of Kenya* another [2017] eKLR as follows:

“A cause of action was defined by Obi Okoye — *Essays on Civil Proceedings*, thus — “By a cause of action is meant any facts or series of facts which are complete in themselves to



found a claim or relief.”In the case of Drummond Jackson v. British Medical Associations & Ors., Lord Pearson stated as follows:-

“..... the expression “reasonable cause of action”No exact paraphrase can be given, but I think “reasonable cause of action” means a cause of action with some chance of success when..... only the allegations in the pleading are considered, if it is found that the alleged cause of action is to fail, the statement of claim should be struck out.”

The Supreme Court of Nigeria in the case of Oshoboja v. Amuda & Ors; held that a reasonable cause of action means a cause of action with some chances of success, when only the allegations in the Statement of Claim are considered. Our law is the law of the practitioner rather than the law of the philosopher. Decisions have to draw their inspiration and their strength from the very facts which framed the issues for decisions.”

34. A cause of action is based on a party’s pleadings that must be supported by the law or legal principle. The factual allegations must thus be aligned with the law or legal principle covering a given situation. The resolution of whether a cause of action is reasonable is a question of law that calls for objective assessment of pleaded facts against the relevant law that is relied on. Whether or not there a cause of action, is therefore an issue of law.

Whether the Preliminary Objections have merit

35. The challenge to this Court’s jurisdiction in view of Article 165 (5) as read with Article 162 (2)(b) was raised. The Respondents contend that the nature of this Petition falls within the jurisdiction of the special courts under Article 162(2) (b) of *the Constitution*. This argument was opposed by the Petitioner who countered that the issue of access to information revolves around violation of fundamental rights and freedoms which falls under the High Court’s jurisdiction.

36. Article 162(2)(b) of *the Constitution* provides as follows:

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- a); and
- b) the environment and the use and occupation of, and title to, land.

37. The Parliament as empowered by Article 162 of *the Constitution* enacted the *Environment and Land Court Act* No.19 of 2011 which deals exclusively with matters falling within its ambit. The Jurisdiction of the Court is defined in Section 13 of the Act 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—

- i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- ii. relating to compulsory acquisition of land;
- iii. relating to land administration and management;



- iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- v. Any other dispute relating to environment and land.

38. It is clear that the High Court has wide jurisdiction to entertain matters including questions relating to the Constitution and the Bill of Rights under Article 165(3) (d) of the Constitution. However, it is also evident that the High Court’s jurisdiction is limited under Article 165(5) as follows:

The High Court shall not have jurisdiction in respect of matters-

- i. Reserved for the exclusive jurisdiction of the Supreme Court Under this Constitution; or
- ii. Falling within the jurisdiction of the Courts contemplated in Article 162(2).

39. The Supreme Court Republic vs Karisa Chengo & 2 others (supra) on the Court’s jurisdiction under Article 162 of the Constitution stated as follows:

“ 50. It is against the above background, that Article 162(1) categorises 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 specialised 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. In their words:

“By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word ‘status’. The intentions of the framers of the Constitution in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”

(51) Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions...”



40. The Court went on to further state:

“ 52 ... 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.”

41. Additionally, in *Mohammed Said v County Council of Nandi* [2013] eKLR the Court observed that:

“The general jurisdiction is set out in Section 13 (1) which emphasizes that the E&LC has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of the Environment & Land Court Act, or any other law applicable in Kenya relating to environment and land. Section 13 (2) clarifies the general jurisdiction in Section 13 (1), probably to avoid ambiguity as to what a matter touching on land and environment is. Section 13 (3) emphatically states that nothing is to preclude the jurisdiction of the Environment & Land Court to hear 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*. A plain reading of Section 13 (3) will demonstrate that the jurisdiction of the court is not limited only to hearing matters touching on violations of Articles 42, 69, and 70 of *the Constitution*. That section does not state that the E&LC is only to hear the matters set out in Articles 42, 69 and 70 of *the Constitution*. The section for whatever reason, is emphasizes the jurisdiction of the court to hear petitions touching on the environment. There is no preclusion to hear any other petition, grounded on any other Article of *the Constitution*, so long as it falls within the purview of land and environment.

18. Indeed, the High Court has no jurisdiction in respect of matters that fall within the jurisdiction of the Environment and Land Court or that falling within the jurisdiction and the Industrial Court. This is set out in Article 165 (5) of *the Constitution*.”

42. Equally in *Mugweru & 4 others (Being the administratrices of the Estate of Maaka Mukubi Mugweru (Deceased)) v National Land Commission & 5 others; Estate of Samuel Mugweru Wathirwa & another (Interested Parties) (Petition 421 & 419 of 2018 (Consolidated))* [2022] KEHC 13252 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment) the Court held that:

“ 134. My interpretation of the preceding Section is that the jurisdiction of the Environment and Land Court is founded on the existence of any dispute with relation to land or environment. In essence therefore where the substratum of a dispute is founded on such, the matter should be exclusively dealt with in the Environment and Land Court...”

136. Considering the matter before this Court, it is apparent that the foundation of the issue is ownership of property LR No 13041 which led to the 1st respondent’s impugned decision. The issue principally relates to the land title and administration of the property which falls within the jurisdiction of the Environment and Land Court. The petitioners however contend that the



issues raised herein deal with the violation of their constitutional rights which this Court has the jurisdiction to entertain.

137. To answer this question I am guided by the Court of Appeal who speaking to this matter in the case of *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others* [2016] eKLR opined as follows:

“This Court considered the issue in Prof. *Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012* and in *Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014*, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of *the Constitution*. The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that *the Constitution* contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant’s claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit.”

138. Similarly, the Court in the case of *Joyce Mutindi Muthama & another v Josephat Kyololo Wambua & 2 others* [2019] eKLR held that:

16. “It is true, as submitted by the Respondents’ counsel, that under Section 13(3) of the *Environment and Land Court Act*, the court has the mandate to hear and determine applications for redress of a denial, violation or infringement of, or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*. However, the Act does not limit or preclude the court from hearing applications for redress of a denial or violation of any other right, if that right is in furtherance of a dispute relating to land and the environment.
17. It is trite that the right to own land and the right to a clean and healthy environment cannot be dealt with in isolation from other rights like the right to a fair hearing, the right not to be discriminated against, the right to a fair administrative action, the right to equal protection and equal benefit of the law, the right to adequate housing, amongst other rights.
18. All these rights have to be interpreted in the context of the Petitioners’ right to own land and the right to a clean and healthy environment, and not in isolation as argued by the Respondents.”(Emphasis is mine).



Also see: Honey Creepers Investment Limited v Cab Investments Company Ltd & 4 others [2020] eKLR.

139. Guided by the above case law, I find the substratum of this case to be title to land. The Environment and Land Court has the jurisdiction to hear and determine matters concerning breach of fundamental rights if the heart of the issue stems from its jurisdiction pertaining to land and environment.”
43. To ascertain the principal objective of this Petition, one needs to look at what is pleaded and the prayers. The Petitioner states that the Respondents have failed to supply her with information pertaining to Umoja Innercore Plot No. A.7 –Sector 1(Nairobi Block 83/14) which she claims is her property having purchased the same on 23rd July 1993 from one Harry Gibson Kinuka.
44. Consequently, she seeks the following reliefs from the Respondents for alleged breach of constitutional right of access to information:
- i. A declaration that the Petitioner has a right to information and records in the Respondents custody with respect to land parcel No. Nairobi/Block 83/14.
 - ii. A declaration that the Respondents have infringed on the Petitioner’s right to information.
 - iii. The 1st Respondent be directed to forthwith furnish the Petitioner with all records and the green card with respect to land parcel No. Nairobi/Block 83/14/885 and Umoja Innercore Plot A-7 Sector 1 (Nairobi/Block 83/14).
 - iv. The 2nd Respondent be directed to forthwith furnish the Petitioner with the file and all records with respect to the suit properties land parcel No. Nairobi/Block83/14/885 and Umoja Innercore Plot A-7 Sector 1 (Nairobi/Block 83/14).
 - v. Compensation of Kshs.2,000,000/- for violation of constitutional rights.
 - vi. Any other/ further orders the court may deem just and appropriate.
 - vii. Costs of this Petition be borne by the Respondents jointly and severally.
45. Clearly, the Petitioner’s claim stems from the alleged violation of right to access information relating to the subject land. Applying the pre-dominant purpose test, it means that the substratum of the information sought relates to a parcel of land. While the failure to issue information pertaining to the land potentially leads to violation of Article 35 of *the Constitution*, it is now settled principle that the Environment and Land Court has the jurisdiction to adjudicate violation of constitutional rights that arise from matters pertaining to or connected to land and the environment and not the High Court.
46. This matter therefore falls under the jurisdiction of the Environment and Land Court as established under Article 162(2) (b) of *the Constitution*. I uphold the preliminary objection that this Court lacks the jurisdiction to deal with the Petition as it relates to matters reserved for the special courts as under Article 165 (5) (b) of *the Constitution*.
47. The Preliminary objection succeeds. The Petition is thus struck out with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH SEPTEMBER, 2024.

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L N MUGAMBI

JUDGE

