



REPUBLIC OF KENYA



**KENYA LAW**  
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**Yano v County Government of Elgeyo Marakwet & 2 others (Constitutional Petition E011 of 2022) [2023] KEHC 337 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 337 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION E011 OF 2022**

**RN NYAKUNDI, J**

**JANUARY 27, 2023**

**IN THE MATTER OF ARTICLES 2, 10, 19 22 AND 23 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE VIOLATION AND THREATENED OF ARTICLES 2, 10, 19, 20,  
21, 27, 28, 40, 42, 47, AND 50 (1) OF THE CONSTITUTION OF KENYA BY THE  
COUNTY GOVERNMENT OF ELGEYO MARAKWET.**

**AND**

**IN THE MATTER OF ABUSE AND MISUSE OF POWER BY THE COUNTY GOVERNMENT  
OF ELGEYO MARAKWET**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT OF ELGEYO MARAKWET ACT OF  
TRESPASSING, DEMOLISHING THE PETITIONER'S BOUNDARY FENCE AND  
FORCEFULLY CONSTRUCTING A ROAD FOR PUBLIC USE OF THE PETITIONER'S  
PARCEL OF LAND KNOWN AS CHERANGANY/KAPCHEROP/1300**

**AND**

**IN THE MATTER OF TRESSPASS AND COMPULSORY ACQUISITION OF  
THEPETITIONER'S LAND WITHOUT FOLLOWING THE DUE PROCESS AND OR  
COMPENSATION**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT OF ELGEYO MARAKWET ACT OF  
TRESPASSING, DEMOLISHING THE PETITIONER'S BOUNDARY FENCE AND  
FORCEFULLY CONSTRUCTING A ROAD FOR PUBLIC USE OF THE PETITIONER'S  
PARCEL OF LAND KNOWN AS CHERANGANY/KAPCHEROP/1300. DEMOLISHING OF**



**THE PETITIONER’S BOUNDARY FENCE AND DESTROYING THE PETITIONER’S CROPS,  
TREES AND VEGETATION THEREON AND  
THE THREATENED FURTHER TRESSPASSING  
OF THE PETITIONER’S SAID PROPERTY**

**BETWEEN**

**PIUS KIPTUM YANO ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF ELGEYO MARAKWET ..... 1<sup>ST</sup> RESPONDENT**

**MEMBER OF COUNTY ASSEMBLY SENGWER WARD, HON DAVID  
KIPKETER ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER, ROADS AND INFRASTRUCTURE ELGEYO MARAKWET  
COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1 Before delving into the merits or otherwise of the application before court. I must at this particular juncture remind parties that jurisdiction is everything and without which a court should down its tools and take no further step as was held in the //locus classicus case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR where the stated as follows on the question of jurisdiction of a court of law.

2 Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

3 The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the *Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

4 Article 162 (2) (b) of the *Constitution*. Article 162 of the *Constitution* provides thus:

162. System of courts

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
  - a) employment and labour relations; and



- b) the environment and the use and occupation of, and title to, land.
3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
  4. The subordinate courts are the courts established under article 169, or by Parliament in accordance with that Article.
- 5 In the discharge of the mandatory obligation placed on it by the Constitution, Parliament enacted the Environment and Land Court Act and set out in details, the jurisdiction of the court. Section 13 thereof outlines the Environment and Land Court’s jurisdiction as follows: -
- (1) The court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under article 162(2) (b) of the Constitution, the court shall have power to hear and determine disputes—
    - (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. (Emphasis added)
- 6 From a cursory look of the pleadings before the court it is clear that the petitioner’s case is primarily anchored on issues of land use and compulsory acquisition of land by a public entity. These are issues that solely line within the jurisdiction of the Environment and Land Court and cannot be dealt with in this particular forum. The court does enjoy concurrent jurisdiction in such matters and therefore cannot pronounce itself on the same. In the matter between which Vuyile Jackson Gcaba v Minister for Safety and Security First and others in 46 Case CCT 64/08 (2009) ZACC 26 the court says:
- “.....Jurisdiction is determined on the basis of the pleadings (47) ...and not the substantive merits of the case.....In the event of the court’s jurisdiction being challenged at the outset (In limine), the applicants pleadings are the are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the courts competence. While the pleadings-including in motion, but also the contents of the supporting affidavits- must be interpreted to establish what the legal basis of the applicants claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly



interpreted, establish that the applicant is asserting a claim.....one tht is to be determined exclusively by....(another court), the High Court would lack jurisdiction.....”\*\*

7 What is the effect of lack of jurisdiction? The end gave is as propounded by the court of Appeal of Nigeria in *Shuabu& anor v Koleosho* (2021) LPELR. 53435(CA)

“.....In law, a court that lacks the jurisdiction to hear and determine a matter would definitely lack the power to make any pronouncements on the merit or otherwise of the matter over which it lacks the jurisdiction, in the first place to entertain since there can be no adjudication on the merits where there is no jurisdiction or competence to adjudicate.”

8 From the evidential material and submissions, filed in support of the petition it’s clear that the petitioner is desirous of this court to waive or consent to the jurisdiction to entertain the cause of action. The purpose of jurisdiction as provided for in the *Constitution* and enabling statute is a matter not capable of being waived, consented to or acquiesced by the court. In no uncertain terms the court has no such powers to extend jurisdiction to itself. This is what was adverted to by the court in *Skypower Exp Always Ltd v UBA plc* (2022) NWLR(PL.1826)203

9 Where a court lacks jurisdiction or competence to entertain an action, the parties to the suit cannot by acquiescence, waiver or even agreement confer jurisdiction or competence upon the court. A party cannot waive in a situation where clearly the court lacks jurisdiction to entertain a matter.....”

10 A casual look at the petitioner’s case, shows that he is aggrieved by the county government decision, to be specific on the protection of right to property as guaranteed under article 40 of the *Constitution*. No amount of coloring can change the pith substance and character of the petition. It falls within the ambit of article 40, and section 13 of the *Environment and Land Court Act* of Kenya. The answer to this question raised by the petitioner, lies in the relevant provision of the aforesaid Act as anchored in the *Constitution*. Applying the principles of Law to the factual matrix of the petition, it is impossible to convert this court to be a forum of conveniens to grant and remedy couched in the name and style of violation and threatened or infringement of articles 1, 10, 19, 20, 21, 27, 28,40,42, 47 and 50 (1) of the *Constitution of Kenya* .

11 It is for the above reasons, this petition shall not be allowed to see the light of the day. It is only good for dismissal having lacked the critical threshold on jurisdiction as his court is a forum of *Non conveniens*.

12 Each party shall bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> DAY OF JANUARY 2023.**

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**R. NYAKUNDI**

**JUDGE**

**(wafritchie@yahoo.com, gikandiadvocate@yahoo.com, ledishahkkittonyadvocates@gmail.com)**

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