



**Mwangi & 2 others v Attorney General & 6 others; Kenya University  
Biotechnology Consortium (KUBICO) & 2 others (Interested Parties)  
(Constitutional Petition E475 & E519 of 2022 & 11 of 2023 (Consolidated))  
[2023] KEHC 19952 (KLR) (Constitutional and Human Rights) (30 June 2023) (Ruling)**  
Neutral citation: [2023] KEHC 19952 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E475 & E519 OF 2022 & 11 OF 2023 (CONSOLIDATED)**

**M THANDE, J  
JUNE 30, 2023**

**BETWEEN**

**PAUL MWANGI ..... 1<sup>ST</sup> PETITIONER  
KENYA PEASANTS LEAGUE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
THE CABINET SECRETARY, TRADE, INVESTMENT & INDUSTRY .... 2<sup>ND</sup>  
RESPONDENT  
CABINET SECRETARY, AGRICULTURE, LIVESTOCK, FISHERIES .... 3<sup>RD</sup>  
RESPONDENT  
THE NATIONAL BIOSAFETY AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**THE KENYA UNIVERSITY BIOTECHNOLOGY CONSORTIUM  
(KUBICO) ..... INTERESTED PARTY  
BIODIVERSITY AND BIOSAFETY ASSOCIATION OF KENYA ... INTERESTED  
PARTY  
ASSOCIATION OF KENYA FEEDS MANUFACTURERS . INTERESTED PARTY**

**AS CONSOLIDATED WITH  
CONSTITUTIONAL PETITION 11 OF 2023**



**BETWEEN**

**LAW SOCIETY OF KENYA ..... PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL BIOSAFETY AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3<sup>RD</sup>  
RESPONDENT**

**KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANIZATION  
(KALRO) ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before this Court for determination is an oral application for consolidation of Petition E 475 of 2022 as consolidated with Petition E519 of 2022 on the one hand, with Petition 11 of 2023 on the other, and for transfer of the same to the Environment and Land Court for hearing and determination.
2. The background of this matter is that by a resolution of 8.11.12, the Cabinet of the Republic of Kenya prohibited the open cultivation of genetically modified crops and the importation of food crops and animal feeds produced through biotechnology innovations (GMO). On 3.10.22 however, the Cabinet lifted the ban on the cultivation within and importation into the Republic of Kenya, of foods and animal feeds that are produced from genetically modified seeds and other organisms (GMO). This in effect removed the prohibition that had been put in place by the Cabinet resolution of 8.11.12.
3. The decision by Cabinet provoked the filing of 3 Petitions. The first Petition is filed by the 1<sup>st</sup> Petitioner and is dated 13.10.22. His case is that the Cabinet decision of 3.10.22 removed all regulatory barriers that had been established over the last 10 years for the protection of the people of Kenya. He terms the decision a threat to the rights and fundamental freedoms in the Bill of Rights and if not quashed, will result in the derogation of the rights and freedoms of the 1<sup>st</sup> Petitioner and the people of Kenya. He therefore seeks the following reliefs:
  1. A declaration that the decision of the Cabinet of the Republic of Kenya made on the 3<sup>rd</sup> October 2022, purportedly lifting a ban on the cultivation within and importation into the Republic of Kenya of foods and animal feeds that are produced from genetically modified seeds and other organisms is unconstitutional for derogating and threatening to derogate the following rights and freedoms of the petitioner and of the people of the Republic of Kenya.
    - a. Freedom of conscience, religion, thought, belief and opinion as guaranteed by Article 32 of the *Constitution*.
    - b. Right to access to information as guaranteed by Article 35 of the *Constitution*.
    - c. Right to food of acceptable quality as guaranteed by Article 43 of the *Constitution*.
    - d. Consumer rights guaranteed by Article 46 of the *Constitution*.
    - e. Right to fair administrative action as guaranteed by Article 47 of the *Constitution*.



2. A declaration that the decision of the Cabinet of the Republic of Kenya made on the 3<sup>rd</sup> October 2022, purportedly lifting a ban on the cultivation within and importation into the Republic of Kenya of foods and animal feeds that are produced from genetically modified seeds and other organisms is unconstitutional for derogating and threatening to derogate the following rights and freedoms of peasants and other people working in rural areas as guaranteed by Article 2(5) and “(6) and/ or Articles 19 (3) (b) and 21(3) of the Constitution.
    - a. The right to adequate food that is produced through ecologically sound and sustainable methods that respect culture and preserves access to food for future generations as guaranteed by Article 15 of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.
    - b. The right to protection of traditional knowledge relevant to plant genetic resources for food and agriculture and the right to maintain, control, protect and develop own seeds and other propagating material and to obtain the support of the state to do so as guaranteed by Article 19 of the United Nations declaration of the Rights of Peasants Working in Rural Areas.
  3. An order awarding costs of the petition to the Petitioner.
  4. Any other or further order writs and directions this court may consider appropriate in the circumstances the purpose of the protection of the petitioners’ rights.
4. The 2<sup>nd</sup> Petitioner, through its Petition dated 24.11.22 claims that vide a letter dated 12.10.22, it sought from the 3<sup>rd</sup> Respondent a copy of any report that could have informed the Cabinet decision as well as evidence of public participation concerning the matter, but no response was forthcoming. On 18.11.22, the 4<sup>th</sup> Respondent stated in a press conference that he would issue a gazette notice to allow importation of maize whether GMO or otherwise. He further acknowledged the risk that GMOs pose to the right to life and stated that there was nothing wrong to adding GMOS to the list of things that could kill Kenyans. The 2<sup>nd</sup> Petitioner contends that neither the decision nor reports preceding the decision, if any, were subjected to public participation. The 2<sup>nd</sup> Petitioner is thus apprehensive that GMOs if permitted into the country will gravely affect their farming, productivity and sustainability as peasant farmers. Further that there is real apprehension that GMOs may compromise the right to health, dignity and right to life of the 2<sup>nd</sup> Petitioner’s members as peasants, and the general public.
5. The 2<sup>nd</sup> Petitioner thus seeks the following reliefs in its Petition:
- a. A declaration be and is hereby made that by declining to respond to the petitioner’s letter dated 12 October 2022, the 2<sup>nd</sup> respondent breached the petitioner’s right to access information under Article 35 of the Constitution.
  - b. A declaration be and is hereby made that the respondents breached the petitioner’s rights to public participation and transparency contrary to the provisions of Article 10 of the Constitution.
  - c. A declaration be and is hereby made that the respondents breached the petitioner’s right to fair administrative action act as envisaged under Article 47 of the Constitution.
  - d. A declaration be and is hereby made that the respondents breached the petitioner’s right to consumer protection as provided for under Article 46 (a) (b) & (c) of the Constitution.
  - e. A declaration be and is hereby issued that the decision of the Government of Kenya vide the Cabinet’s Despatch dated 3<sup>rd</sup> October 2022 in relation to GMO be acted ultravires in usurping



the powers of the 2<sup>nd</sup> respondent and subsequent thereto, pleased to issue an order of certiorari quashing the decision dated 3<sup>rd</sup> October 2022.

- f. An order of prohibition and permanent conservatory order be issued restraining the respondents either by themselves or through agents or such other person acting on their behalf from lifting the ban and/ or importing and cultivating GMOs save as prescribed under the laws of Kenya, the international conventions and protocols; and the observations of this Honourable Court.
  - g. Costs of the petition herein.
  - h. Any other order as this Honourable Court may deem fit.
6. Petition No 11 of 2023 (the ELC Petition) is dated 16.1.23. It was filed in the Environment and Land Court (ELC) in Nyahururu. The Petitioner has similarly taken issue with the impugned Cabinet decision that lifted the ban on open cultivation and importation of Genetically Modified (GM) Maize and the subsequent approval by the 2<sup>nd</sup> Respondent of the 4<sup>th</sup> Respondent's application for environmental release and placement into the market of Bt. maize and its varietal derivatives in Kenya for purposes of cultivation, food, feed, processing (FFP), import, export and transit for a period of 10 years. It alleges that the ban was lifted without proper public participation and awareness nor a risk assessment on the negative impact of GMOs on environment done contrary to the universal precautionary principle. The lifting of the said ban was not gazetted, which demonstrated that the public was not properly informed on the directive and was not accorded sufficient time to read, understand and engage the Respondents on the directive contrary to Article 35(3) of the *Constitution*. Further due process was not followed as stipulated in the *Statutory Instruments Act*, 2013 requiring regulation-making authorities to undertake appropriate consultations before making statutory instruments. As a result, the right to a clean and healthy environment, right to public participation and awareness, right to information and right of choice of the consumer were violated.
7. The Petitioner thus seeks the following reliefs:
- a. A declaration that the petitioners' and publics' right to clean and healthy environment guaranteed by Article 42 of the *Constitution*, Article 12(2) (b) of the *International Covenant on Economic, Social and Cultural Rights* (ICESR) and Article 24 of the *African Charter on Humans and People's Rights* (ACHPR) have been contravened by the actions and omissions of the Respondents.
  - b. A declaration that the systematic denial of access to information to the petitioners by the respondents on the health and ecological effects of Bt Maize and what precautionary measures to be taken violated the petitioner's rights to information as provided under Article 35(1) (a), (b) and (3) of the *Constitution*.
  - c. An order of Mandamus stopping any further open cultivation, importation and exportation of Bt Maize pending an Environmental Impact Assessments on open cultivation of Bt Maize on the environment.
  - d. An order of mandamus be issued against the respondents directing them to develop and implement regulations adopted from best practices with regard to prevention of unintended transgene transfer between Bt. Maize and conventional landraces.
  - e. An order of mandamus be issued against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents to take steps towards ensuring that regulations dealing with licensing, setting up operation, supervision of the activities as well as independent scientific monitoring of all entities dealing in biotechnology



are designed, enacted and implemented to provide effective deterrence against the threats to protected rights under the Constitution.

- f. Permanent conservatory orders to compel the respondents to adopt the precautionary principle in environmental management with respect to preventing unintended transgene between genetically modifies maize and non- genetically modified maize.
  - g. An order of compensation/ restitution under the “Polluter pay” for any consumer health and / or environmental damage and forth loss of life or economic loss.
  - h. Any other relief the Court deems fit.
  - i. The cost of the petition be provided for.
8. On 28.3.23, the ELC Petition was transferred to the ELC in Nairobi and was to be mentioned before the Presiding Judge on 25.4.23 for re-allocation. On 11.5.23, the Presiding Judge of the ELC gave the following directions:

In view of the pending two petitions in the High Court on the question of the ban in the importation and open cultivation of GMO, which is also an issue in this petition, the decision has to be made on which Court as between the ELC and the High Court should determine the three petitions. For those reasons, I transfer this petition to the Constitution and Human Rights Division of the High Court on condition that in the event it is found that the three petitions should be heard by the ELC, the same will be re-transferred to this court. The petition to be mentioned before the Presiding Judge, Constitutional and Human Rights Division on 17/05/2023 for directions.

9. The matter is now before this Court for a determination whether the consolidated Petitions and the ELC Petition should be consolidated and transferred to the ELC for hearing and determination.
10. It is noted that the ELC Petition seeks redress against violation of the public’s rights to a clean and healthy environment, highest attainable standard of health, right to clean and safe water and right of access to information. This Petition is centred on environmental issues and the impact of open cultivation of Bt. Maize on the environment. The Petitioner is apprehensive about the environmental impact of unintended gene transfer from cross-pollination between the Bt. Maize and non- Bt. Maize; risk to non-target species such as bees and butterflies, and possible development of superweeds. The Petitioners alleges insufficient public participation in the conceptualization and implementation of the lifting of the ban in question, contrary to the provisions of Articles 10, 69 and 70 of the Constitution and the Environmental Management and Co-ordination Act (EMCA) which obligate the Respondent to fashion an effective programme of public participation during the conceptualization of the lifting of the ban and its various individual components.
11. It is also claimed in the Petition that there was also no evidence to demonstrate that the steps prescribed under Regulations 17, 22 and 23 of the Environmental (Impact Assessment and Audit) Regulations, 2003 were adhered to. In addition, the Petitioner alleges that the Government failed to disclose the contents of the 2012 report that led to the ban of the GMOs in Kenya and the new information that has led to the lifting of the ban in 2022. According to Petitioner, access to information under Article 35(1) of the Constitution is a key pillar in the environmental governance because effective public participation in decision- making depends on full, accurate and up-to- date information. The Petitioner further contends that the Executive could not purport to issue a directive with drastic social, economic, health and environmental consequences without recourse to Parliament. Lastly that the Environmental and Social Impact Assessment (ESIA) process was not adequately done if any; that the



EIA License requirements were not adhered to; that Strategic Environmental Assessment (SEA) was not done before lifting of the ban to adequately account for all public policies, plans, best practices and impacts of open cultivation and importation of Bt. Maize; that open cultivation of Bt. Maize was approved before the EIA was issued contrary to the law. Lastly, that the Respondents failed to facilitate adequate public participation as required by the Constitution and the EMCA.

12. The High Court and the ELC are listed as superior Courts in Article 162 of the Constitution which provides:

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned 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).

13. Article 165(3), (6) and (7) stipulates the jurisdiction of the High Court as hereunder:

- (3) Subject to clause (5), the High Court shall have—
  - a. unlimited original jurisdiction in criminal and civil matters;
  - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - d. 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



- e. (e) any other jurisdiction, original or appellate, conferred on it by legislation.
  - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
14. Article 165(5) ousts the jurisdiction of this Court over certain matters as follows:
- (5) The High Court shall not have jurisdiction in respect of matters—
    - (a) 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).
15. By dint of Article 162(2)(b) and 165(5)(b) of the *Constitution* it is clear that this Court lacks jurisdiction to deal with matters that are for the exclusive jurisdiction of the ELC. Article 165(5) strips the High Court of jurisdiction over matter relating to land and the environment. It provides as follows:
- The High Court shall not have jurisdiction in respect of matters— (a) 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).
16. Under Article 162(2) Parliament was mandated to establish the Courts referred to in Article 165(5) and to determine their jurisdiction and functions provides as follows:
- (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).
17. In compliance with Article 162 Parliament did enact legislation that established the said Courts and stipulated their functions and jurisdiction. Relevant to the matter herein is the Environment and Land Court which was established under the *Environment and Land Court Act*, 2011. Section 13 of the Act stipulates the jurisdiction of the ELC as follows:
- 1. The Court shall have 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 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*.
4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
  - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including——
    - a. interim or permanent preservation orders including injunctions;
    - b. prerogative orders;
    - c. award of damages;
    - d. compensation;
    - e. specific performance;
    - f. restitution;
    - g. declaration; or
    - h. costs.

18. The substantive issues in the ELC Petition relate to the right to clean and healthy environment; the systematic denial of access to information on the health and ecological effects of Bt Maize and precautionary measures to be taken; stopping of open cultivation, importation and exportation of Bt Maize pending an Environmental Impact Assessments on open cultivation of Bt Maize on the environment; development and implementation of regulations adopted from best practices with regard to prevention of unintended transgene transfer between Bt. Maize and conventional landraces; regulations dealing with licensing, setting up operation, supervision of the activities as well as independent scientific monitoring of all entities dealing in biotechnology are designed, enacted and implemented to provide effective deterrence against the threats to protected rights under



the Constitution adoption by the Respondents of the precautionary principle in environmental management with respect to preventing unintended transgene between genetically modified maize and non-genetically modified maize and compensation/ restitution under the “Polluter pay” for any consumer health and/or environmental damage and forth loss of life or economic loss.

19. In the ELC Petition, the rights that are alleged to have been violated relate to a clean and healthy environment under Article 42. The Petition also invokes the provisions of Article 69 which places obligations on the State in respect of the environment. The Petitioner further seeks enforcement of environmental rights under Article 70. The ELC has the jurisdiction to entertain applications for redress relating to rights under Articles 42, 69 and 70 of the Constitution. Section 13(3) of the Act is clear that nothing in the 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. The claim in the ELC Petition by nature, falls within the exclusive jurisdiction of the ELC. A look at the jurisdiction of the ELC as set out in the ELC Act, it can readily be seen that it the ELC and not this Court, that has jurisdiction over the ELC Petition. It follows therefore that this Court lacks the jurisdiction to entertain the ELC Petition.
20. The jurisdiction of this Court and of the ELC is different and distinct. Pursuant to Article 165(5) of the Constitution, this Court is precluded from entertaining matters reserved to the ELC. By inference and given the jurisdiction stipulated in Section 13 of the ELC Act, the ELC is precluded from entertaining matters that reserved for the jurisdiction of the High Court. In so finding, I am duly guided by the holding in the case of Republic v Karisa Chengo & 2 others [2017] eKLR, where the Supreme Court addressed the issue of jurisdiction of this Court and the Courts established pursuant to Article 162(2) of the Constitution. The Court stated:

(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. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from the Constitution, or legislation (see *In Re the Matter of the Interim Independent Electoral Commission*, at paras. 29 and 30; and *Samuel Kamau Macharia and another v Kenya Commercial Bank and 2 others*, Sup.Ct. Civil Application No 2 of 2011 [para. 68]). In this instance, the jurisdiction of the specialized Courts is prescribed by Parliament, through the said enactment of legislation relating, respectively, to the ELC and the ELRC. Such legislation is to be interpreted in line with relevant constitutional provisions hence our position in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others*, Sup. Ct. Civil Application No 5 of 2014; [2014] eKLR, where we examined the constitutional provisions alongside legislative provisions on elections, and held [para. 77] that “the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.” In the instant case too, we take guidance from the Constitution, as we interpret it alongside the relevant statute law, pertaining to the specialized Courts.

(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 *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 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. (emphasis)

21. Having found that the ELC Petition is the preserve of the exclusive jurisdiction of the ELC, this Court is accordingly precluded from entertaining the same. This incidentally, is the position of all the parties herein. They are all in agreement that the ELC Petition should be heard and determined by the ELC Court. Indeed, the Petitioner in the ELC Petition contended that the Petition would have been dismissed had it been filed in this Court. Further that this Court lacks the jurisdiction to address all issues in the ELC Petition.
22. The question that the Court must now determine is whether the consolidated Petitions ought to be transferred to the ELC for hearing and determination.
23. The Respondents seek the transfer of the consolidated Petitions to the ELC for consolidation with the ELC Petition for hearing and determination. It is their case that the dominant issue in the impugned Cabinet decision giving rise to all 3 Petitions relates to the environment, namely GMO. Further that having the matters proceed in different Courts, may lead to conflicting decisions which would in turn occasion embarrassment to the Courts and to the parties. Their position therefore is that this Court lacks jurisdiction to determine environmental issues. The ELC on the other hand has the requisite jurisdiction to deal with the GMO question which is environmental, and further to deal with any constitutional issue incidental thereto. They contend that the consolidated Petitions raise issues to do with the environment and should therefore be heard by the ELC. They further submitted that no prejudice will be suffered by the Petitioners if all Petitions are heard by the ELC.
24. The Petitioners however oppose this, arguing that their Petitions raise issues that are purely human rights, judicial review and administrative law and outside the jurisdiction of the ELC Court.
25. In the case of *Patrick Musimba v National Land Commission & 4 others* [2015] eKLR, a 5-Judge bench of this Court considered the Concurrent and coordinate jurisdiction of this Court and the ELC and stated:
  63. In view of the 2012 amendments to the ELC Act one would be tempted to conclude that on a true construction of section 13 (3) of the ELC Act the jurisdiction of the ELC in so far as enforcement of constitutional rights was concerned, was limited and restricted by Parliament to matters relating to a clean and healthy environment under Articles 42, 69 and 70 and not environment and land generally under Article 40 of the *Constitution*. The Court of Appeal's decision in Mugendi as read together with Section 13 of the ELC Act however lead to the plausible conclusion that the ELC has jurisdiction to determine matters of a constitutional nature as well. We also say so as it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting



issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.

65. The above analysis lead us to the conclusion that both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither the *Constitution* nor the ELC Act limit the High Court's jurisdiction in this respects while a closer reading of the ELC Act reveals that the ELC Court's jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned but the Court of Appeal in Mugendi expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We hold that in matters constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land.
68. We are satisfied that although the jurisdiction in constitutional matters conferred by Section 13(3) of the ELC Act upon the ELC appears limited to questions on and application for redress of a denial violation or infringement or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42,69 and 70 of the *Constitution*, the section did not purport to confer exclusive jurisdiction in such cases upon the ELC so as to impinge upon the provisions of Article 165(3)(b) & (d) of the *Constitution*. We are also satisfied that it could not have been the intendment of the draftsmen of the *Constitution* that when the court is faced with a mixture of causes of action touching on the *Constitution*, especially on fundamental rights, a separationalistic approach is to be adopted by the court and half the claim dispatched to one court as the other half is retained.
26. Flowing from the above decision it can be seen that both the High Court and the ELC have a concurrent and or coordinate jurisdiction and can entertain constitutional matters that touch on the environment and land. The ELC may deal with claims of breaches of fundamental rights when dealing with disputes concerning the environment and land. The only rider is that the matter before the ELC must concern the environment and land.
27. While the *ELC Act* limits the ELC's jurisdiction in constitutional issues to those touching on land and environment, it does not limit the High Court's jurisdiction in this respect, nor does the *Constitution*. Odunga, J. (as he then was) was of a similar view as the learned Judges in the *Patrick Musimba, case (supra)* when dealing with the co-ordinate and concurrent jurisdiction of this Court and that of the Employment and Labour Relations Court in the case of *Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & another (Interested Parties)* eKLR. The learned Judge stated:
46. Similarly, pursuant to Article 23(3) of the *Constitution* as read with section 12(3) of the *Employment and Labour Relations Court Act*, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the jurisdiction to do so is confined to matters falling within Article 41 of the *Constitution* as read with section 12 of the *Employment and Labour Relations Court Act*. The Court cannot therefore purport entertain petitions outside the aforesaid matters as its jurisdiction



is limited only in so far as employment matters and matters related thereto are concerned. In my view the matters which fall within the ambit of Article 162(2) of the *Constitution* must be matters within the exclusive jurisdiction of the said specialised Courts. However, as stated above, the Employment and Labour Relations Court may not embark on a generalized handling of petitions but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within the court's jurisdictional competence and specialization. Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the *Constitution*. As was held in Nairobi High Court Petition No 613 of 2014 – *Patrick Musimba v The National Land Commission and others*:

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

28. The consolidated Petitions herein raise issues touching on violation of Article 35, the right to information, Article 10 on national values and principles of governance, Article 43 on economic and social rights, Article 46 on Consumer rights and Article 47 on fair administrative action. It is quite clear that all these issues fall squarely within the ambit of Article 165(3) of the *Constitution* and are for the High Court. Conversely, none of these issues can be entertained by the ELC as they do not fall under Article 162 of the *Constitution* or Section 13 of the ELC Act.
29. Rule 17 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules) provides that the court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem.
30. In the case of *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* (Civil Suit No 992 of 1994) Maraga, J. (as he then was) defined consolidation to mean:

Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

1. some common question of law or fact arises in both or all of them; or
2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
3. for some other reason it is desirable to make an order for consolidating them.

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and the



same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.

31. The Supreme Court considered an application for consolidation of 3 petitions for appeal in the case of *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR. Wanjala & Njoki, SCJJ stated as follows:

(39) The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.

32. Flowing from the foregoing authorities, it can be deduced that the purpose of consolidation is to facilitate the efficient and expeditious disposal of disputes. Consolidation also provides a framework for a fair and impartial dispensation of justice to the parties as well as avoid multiplicity of proceedings between same parties and covering the same ground. Further it saves on costs and expenses. Notably the matters to be consolidated must be pending in the same court and some common question of law or fact arises in both or all of them. Further that the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions.

33. It is quite evident that whereas all 3 Petitions arise from the impugned decision of the Cabinet, as can be seen from the foregoing, the consolidated Petitions on the one hand raise purely constitutional and human rights issues, while the ELC Petition on the other hand is an environmental claim with a focus on Bt. maize as the main issue. The redress sought for violation of constitutional rights is incidental to this main issue.

34. It is noted that the consolidated Petitions were filed and are pending in this Court while the ELC Petition was filed before the ELC. Having looked at all 3 Petitions, it is quite evident as stated herein, that the reliefs sought in the consolidated Petitions on the one hand are different from those sought in the ELC Petition. Further this Court lacks jurisdiction to deal with the ELC Petition just as the ELC lacks jurisdiction to deal with the consolidated Petitions. A matter within the exclusive jurisdiction of one court cannot be consolidated with a matter within the exclusive jurisdiction of another court. The jurisdiction of the ELC to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedoms, is limited to the right relating to a clean and healthy environment under Articles 42, 69 and 70 of the *Constitution*. In light of this, it is quite clear that the ELC has no jurisdiction to hear and determine the consolidated Petitions which seek enforcement of rights beyond those relating to the environment. In light of this, consolidation of the Petitions for hearing by the ELC as sought, would occasion a miscarriage of justice to the parties in the consolidated Petitions. Accordingly, consolidation is not tenable. Similarly, the 3 Petitions even if not consolidated, cannot be heard in the same Court.

35. In view of the foregoing, I make the following orders:

- i. Petition No 11 of 2023 is hereby sent back to the Environment and Land Court for hearing and determination.
- ii. The consolidated Petitions shall proceed to hearing and determination in this Court.



DATED AND DELIVERED IN NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2023

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**M. THANDE**

**JUDGE**

In the presence of: -

..... for the 1<sup>st</sup> Petitioner

..... for the Respondents

,

..... for the 1<sup>st</sup> Interested Party

..... for the 2<sup>nd</sup> Interested Party

..... for the 3<sup>rd</sup> Interested Party

.....Court Assistant

