



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**(Coram: A. C. Mrima, J.)**

**PETITION NO. E018 OF 2021**

**-BETWEEN-**

**DR. A.W.G.....PETITIONER**

**-VERSUS-**

**1. DR. D.N.K.**

**2. CRESCENT VIEW HOLDINGS LTD .....RESPONDENTS**

**RULING NO. 1**

1. When this matter was first filed under certificate of urgency on 15<sup>th</sup> January, 2021, this Court raised a red flag on jurisdiction.
2. The Respondents herein later filed a Notice of Preliminary Objection dated 18<sup>th</sup> February, 2021 wherein they raised the following issues:
  - a) *The petitioner has not raised any constitutional issue capable of being determined by this honourable court by virtue of Article, 21, 22, 27, 26, 40, 45 and 68 of the Constitution of Kenya, 2010 and as such the Application dated 14<sup>th</sup> January, 2021 and the petition of even date should be dismissed with costs to the 1<sup>st</sup> Respondent.*
  - b) *The application and the petition do not specifically set out the provisions in the Constitution that have been allegedly violated and the particulars of the alleged violations/breach of the provisions by the 1<sup>st</sup> and 2<sup>nd</sup> respondent to enable the Respondent reply appropriately.*
  - c) *The application and the petition as drawn do not meet the threshold of constitutional litigation as they do not raise any public law issues and only raise can be adequately canvassed at the Family Court Division of the High Court and or the Environment and Land Court. The application and the petition fall squarely in the realm of Private Law.*
  - d) *The Affidavits sworn on 14<sup>th</sup> January, 2021 by Dr. Agnes Wanjiru Gichuhi in respect of the said application dated 14<sup>th</sup> January, 2021 is in breach of Section 5 of the Oaths and Statutory Declarations Act (Cap 15) of the Laws of Kenya.*
  - e) *The application is an abuse of the court process and should thus be dismissed with costs to the 1<sup>st</sup> Respondent.*
3. This Court then directed parties to file submissions on the objection. They complied.
4. This ruling is, therefore, in respect of the objection.
5. As the objection also incorporated the aspect of jurisdiction of this Court, I will deal with the issue, in the first instance.
6. Since the issue of jurisdiction was raised by both the Court and the Respondents, I will not belabour to ascertain whether the objection is a proper one in law. Suffice to say that in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR*, the Supreme Court held that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis.
7. How is jurisdiction defined? *Jurisdiction* is defined in *Halsbury’s Laws of England* (4<sup>th</sup> Ed.) Vol. 9 as “...the authority which a Court

has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”. **Black’s Law Dictionary**, 9<sup>th</sup> Edition, defines jurisdiction as the Court’s power to entertain, hear and determine a dispute before it.

8. In **Words and Phrases Legally Defined** Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

*By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.*

9. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in **Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1** expressed himself as follows on the issue of jurisdiction: -

*Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...*

10. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in **Jamal Salim v Yusuf Abdulahi Abdi & another** Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

*Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;*

1) .....

2) *The jurisdiction either exists or does not ab initio ...*

3) *jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

11. On the centrality of jurisdiction, the Court of Appeal in **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** stated that: -

*So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.*

12. On the source of a Court’s jurisdiction, the **Supreme Court of Kenya** in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated 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.*

13. And, in **Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR**, the Court of Appeal further stated:

*[44] ... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...*

14. From the foregoing, it is sufficiently settled that a Court’s jurisdiction is derived from the Constitution, an Act of Parliament or both.

15. The Respondents’ contention is that the matter does not raise any constitutional issues for it falls squarely under the Environment and Land Court or the Family Court.

16. In determining the controversy, this Court will ascertain whether the matter falls within the Environment and Land Court.

17. Contextualizing the above in this matter, the guiding provisions are **Articles 165(3) and (6) and 162** of the **Constitution** and **Section 13** of the **Environment and Land Court Act** respectively. *Article 165(3) and (6)* elaborately sets out the jurisdiction of the High Court as follows:-

(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) *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.*

18. Article 162(2) and (3) 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).*

19. The legislation contemplated under Article 162(3) is the **Environment and Land Court Act**.

20. 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)

21. The issue of the jurisdiction of the specialized Courts has been determined with finality by the superior Courts 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 [2015] eKLR 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 specialised 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.....*

22. The matter was appealed to the Supreme Court in Petition No. 5 of 2015 **Republic vs. Karisa Chengo & 2 Others** [2017] eKLR. The Supreme Court rendered itself as follows: -

*[50] ... 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.*

*[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 *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.*

*[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).*

23. The foregoing is the obtaining legal position.

24. The matter, however, did not end there. A further problem arose. It was on the cases raising ‘cross-cutting’ or ‘cocktail’ or ‘mixed grill’ issues within either Courts.

25. 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 before Court test**’.

26. The proponents of the former include *Ngugi, J* who rendered himself in **Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another (2016) ECLR** 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 pre-dominant 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.*

41. *Munyao, J* was for the other test. In **Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another [2018] eKLR** 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.

42. 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**, Civil Appeal No. 83 of 2016 [2017] eKLR, 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.

43. The Court of Appeal, therefore, settled for the '**pre-dorminant purpose test**'. Therefore, that is the test I will use in this case.

44. The Petitioner sought for the following prayers in the Petition: -

1. A conservatory order be and is hereby issued by this Honourable court to maintain the status quo pending the hearing and determination of the application filed herewith and subsequently pending the hearing and determination of this petition.

2. A declaration that the petitioner has occupational rights, and the same cannot be terminated or defeated in any manner whatsoever by the Respondents

3. An order prohibiting, restricting and interdicting the respondents from in any way, directly or indirectly, dealing with the home contrary to such occupational rights, either by themselves or by their agents, nor in the guise of the 2nd Respondent by the 1st Respondent.

4. Costs of this petition

45. The Petitioner's cause of action was based on the use and occupation of the house on the parcel of land known as Nairobi/Block110/111. The Petitioner contended that her occupational rights over the property were violated. She then rushed to Court for protection.

46. According to the Petitioner, the purpose of the premises known as Nairobi/Block110/111 was for occupation as a matrimonial home with the 1<sup>st</sup> Respondent. As said, the Petitioner rushed to Court since her occupational rights were allegedly infringed.

47. Article 162(2)(b) of the Constitution provided for the establishment of one of the specialised superior Courts to deal with matters relating to *the environment and the use and **occupation of**, and title to, land*.

27. Under Article 165(5), the Constitution excludes the High Court from exercising jurisdiction over matters falling within the jurisdiction of the Courts contemplated under Article 162(2) of the Constitution. One of those Courts is the Environment and Land Court.

48. On whether the Environment and Land Court has jurisdiction to deal with matters relating to violation of the Bill of Rights and the Constitution in respect to the matters falling within its jurisdiction, Section 13 of the Environment and Land Court Act settles that jurisdictional issue as follows: -

**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.**

49. Courts have also settled, in the affirmative, the issue of Courts of equal status as the High Court having jurisdiction to deal with any constitutional issues in a matter in which they have jurisdiction over. Such include **United States International University -vs-Attorney General & 2 Others (2012) eKLR**, **Christopher Gatuiri v Commissioner of Police (2008) eKLR**, **Jane Frances Angalia v Masinde Muliro University of Science And Technology and Others (2010) eKLR** among others.

50. From the guidance of the Court of Appeal in the *Co-operative Bank of Kenya Limited* case (supra) and the above analysis, there is no doubt that the matter relates to the occupation of land and the High Court cannot exercise any jurisdiction.

51. Having so found, this Court will not deal with any of the other issues raised in the objection. Such issues shall be dealt with by the appropriate Court.

52. In the end, this Court issues the following final orders: -

**(a) The High Court has no jurisdiction over the Petition in this matter.**

**(b) This matter is hereby transferred to the Environment and Land Court in Nairobi.**

**(c) Costs in course.**

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY, 2022.**

**A. C. MRIMA**

**JUDGE**

**Ruling No. 1 virtually delivered in the presence of:**

**Miss. Wanjaa**, Counsel for the Petitioner.

**Mr. Mwangi**, Counsel for the Respondents.

**Elizabeth Wanjohi** – Court Assistant