



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

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

**CONSTITUTIONAL PETITION NO. E336 OF 2020**

**-BETWEEN-**

**BENSON MAKORI MAKWORO.....PETITIONER**

**-VERSUS-**

**NAIROBI METROPOLITAN SERVICES.....1<sup>ST</sup> RESPONDENT**

**KENYA URBAN ROADS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION.....3<sup>RD</sup> RESPONDENT**

**RULING NO. 1**

1. It is the Petitioner's case that he runs a restaurant on the parcel of land known as L.R. No. 209/1099 situate off Weruga Lane. He posited that the business is served by Haile Selassie Avenue, Railway Lane, Exchange Lane and Weruga Lane which are all public roads or lanes.

2. The Petitioner posited that the Respondents embarked on various construction works by erecting barriers, walls and steel structures with the effect of permanently blocking members of public from accessing the said lanes and from reaching his restaurant.

3. As a result, the Petitioner filed a Petition dated 15<sup>th</sup> October, 2020 seeking the following orders: -

a) *A declaration that Weruga Lane, Exchange Lane and Railway Lane in Nairobi County (Central Business District) are reserve roads/lanes for free use by members of the public including the Petitioner.*

b) *A declaration that the Respondents acted illegally and unconstitutionally in obstructing members of the public from accessing and using Weruga Lane, Railway Lane and Exchange Lane all being public properties reserved for use by members of the public.*

c) *A declaration that the Petitioner and other members of the public have a right to access and use all roads and lanes set aside for use by members of the public including Exchange Lane, Railway Lane and Weruga Lane.*

d) *A declaration that the obstruction of Exchange Lane, Railway Lane and Weruga Lane was done in breach of the rules of natural justice, procedural and administrative fairness and national values and principles of governance.*

e) *A permanent injunction to restrain the Respondents, their officers, servants or agents from blocking the Petitioner's access to and use of Exchange Lane, Railway Lane and Weruga Lane.*

f) *A mandatory injunction compelling the Respondents jointly and severally to demolish and remove all walls, gates, barriers and any other obstructive material blocking the Petitioner's access and use of Exchange Lane, Railway Lane and Weruga Lane.*

g) *An order of judicial review in the nature of certiorari to bring into this Honourable court and quash the decision of the Respondents to obstruct Exchange Lane, Railway Lane and Weruga Lane.*

h) *Any other or further relief as may be in the interest of justice.*

4. In response to the Petition, the Hon. Attorney General, who appeared on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, filed a Notice of Preliminary Objection dated 13<sup>th</sup> January, 2020.

5. The objection was tailored as follows: -

1. *The Honourable Court lacks jurisdiction to hear and determine the petition 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 courts contemplated in Article 162 (2)."*

2. *That section 13 of the Environment and Land Court Act provides that the Environment and Land Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162 (2) (b) of the Constitution and shall have powers to hear and determine disputes relating to environmental planning and protection, land use planning, title, tenure, boundaries, rates, valuations, mining, minerals and other natural resources; disputes relating to public, private and community land and contracts, choses in action or instruments granting any enforceable interests in land and any other dispute relating to environment and land.*

3. *That section 13 (7) of the Environment and Land Court Act provides that the Environment and Land Court can issue prerogative orders, which provision if read together with the provisions of Article 162 (2) of the Constitution ousts the jurisdiction of this Court to hear and determine this case.*

4. *The Petitioner's case is premised on the right of access and use of all roads and lanes set aside for use by members of the public, which is within the jurisdiction of this Honourable Court.*

5. *That the Petitioner's case being a case that is seeking the exercise of supervisory jurisdiction over administrative body's decision in respect to the use of land particularly on the right to own property guaranteed under Article 40 of the Constitution can only be determined by the Environment and Land Court.*

6. *THAT in the matter of **OMAR TAHIR SAID V REGISTRAR OF TITLES & ANOTHER [2013] eKLR**. This petition arises out of the revocation of the petitioner's title to land described as [LR.NO.MN/1/2411](#) by way of administrative fiat. The petitioner sought Judicial Reviews orders that the revocation carried out by the 1<sup>st</sup> Respondent is unconstitutional, null and void abinitio. The High Court held that*

***"It follows that the High Court's enforcement jurisdiction does not extend to matters relating to disputes falling Under Section 13(2) of the E and L Court Act. That is the preserve of the E and L Court. There is need for this clarity so that litigants know which Court has jurisdiction in respect to which dispute. Perceptions and suspicions of forum shopping would be minimized or eliminated."***

6. This Court directed that the objection be first heard and determined. To that end, the parties were further directed to file their respective written submissions.

7. The Hon. Attorney General filed its submissions in support of the objection. It also referred to some decisions. The Petitioner also filed his submissions, but in opposition to the objection. He also referred to some decisions in furtherance of his case.

8. The 3<sup>rd</sup> Respondent opted not to participate in the objection.

9. Without reiterating the parties' submissions herein verbatim, suffice to say that I have carefully considered the objection in light of the submissions on record.

10. Having said so, I must point out that the Petitioner principally conceded that his claim related to infringement of his rights and fundamental freedoms relating to land and environment. However, the Petitioner posited that the jurisdiction of the Environment and Land Court to deal with the Petition was ousted by the reason that the Petitioner was not claiming title to or ownership of land.

11. The Petitioner submitted that he sought to assert his rights and fundamental freedoms as guaranteed under Chapter Four of the Constitution, while also seeking the protection from this Honourable Court by invoking the power of the Court pursuant to Articles 22, 23 and 165 of the Constitution.

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents mainly contended that the matters raised in the Petition fall squarely under the Environment and Land Court.

13. Given the foregoing parties' positions, I will not belabour a detailed discussion on the subject of jurisdiction. I will, however, briefly reiterate what the Court of Appeal stated in Nakuru Civil Appeal No. 119 of 2017 **Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others** consolidated with Civil Appeal No. 139 of 2017 **County Government of Embu & Another vs. Eric Cheruiyot & 15 Others** (unreported) in a decision rendered on 8<sup>th</sup> February, 2022 on the doctrine of jurisdiction in general as follows: -

36. *Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court 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 the 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 the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to 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 of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.*

37. The locus classicus on jurisdiction is the celebrated case of ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1***. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

**...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 pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.**

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

39. 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.**

40. In ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011***, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the ***Interim Independent Electoral Commission (supra)*** at paragraph 68 of its ruling, the Supreme Court held as follows:

**(68). 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 itself jurisdiction exceeding that which is conferred upon it by law.**

14. As the objection to the jurisdiction of this Court was raised by way of a preliminary objection, I will look at the law on preliminary objections.

15. The validity of any preliminary objection is gauged against the requirement that it must raise pure issues of law capable of disposing of a dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

16. The foregoing nature of preliminary objections was discussed in ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd, (1969) E.A. 696 page 700*** when the Court observed as follows: -

...so far as I am aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...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.

17. In ***Civil Suit No. 85 of 1992, Oraro vs. Mbaja [2005] 1 KLR 141, Ojwang J***, as he then was, cited with approval the position in ***Mukisa Biscuit -vs- West End Distributors (supra)*** and stated as follows on the operation of preliminary objection: -

... I think the principle is abundantly clear. A "preliminary objection", correctly understood, 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 processes 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.

18. In ***Omondi -vs- National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177***, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

*...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.*

19. On the question as to whether jurisdiction is a point of law, the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.

20. I will now deal with the merits of the objection.

21. Contextualizing the foregoing 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.

22. 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).

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

24. 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)

25. 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....*

26. 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).*

27. The foregoing is the obtaining legal position.

28. 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.

29. 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**’.

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

31. *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.

32. 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.

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

34. The dispute before Court is essentially on whether the lanes in issue form part of public land and if so, whether their current use is appropriate. In dealing with the main issue, the Court will also ascertain if the use of the said land infringed the rights and fundamental freedoms of the Petitioner. The predominant issue, therefore, is the nature of the land and its use. The alleged infringement of the Petitioner's rights and fundamental freedoms is, hence, ancillary to the main issues.

35. 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 Petition deals with land ownership and its use. In that case, the jurisdiction of the High Court is expressly ousted under Article 162(5)(b) of the Constitution.

36. Consequently, the Petition dated 15<sup>th</sup> October, 2020 be and is hereby struck out. Each party shall bear its own costs.

37. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2022.**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Arthur Ingutya**, Learned Counsel for the Petitioner.

**Mr. Marwa**, Learned State Counsel instructed by the Honourable Attorney General for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Miss Kabaji**, Learned Counsel for the 3<sup>rd</sup> Respondent.

**Elizabeth Wanjohi** – Court Assistant