



Republic v Inspector General of the National Police Service & another; Estate of Tahir Sheikh Said Ahmed (Interested Party); NCBA Bank Kenya PLC (Exparte) (Judicial Review Miscellaneous Application E048 of 2021) [2022] KEHC 10621 (KLR) (24 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E048 OF 2021**

JM MATIVO, J

MAY 24, 2022

BETWEEN

REPUBLIC APPLICANT

AND

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE 1ST RESPONDENT

LAND REGISTRAR, MOMBASA 2ND RESPONDENT

AND

ESTATE OF TAHIR SHEIKH SAID AHMED INTERESTED PARTY

AND

NCBA BANK KENYA PLC EXPARTE

RULING

1. This ruling disposes a preliminary objection raised by the Interested Party dated 2nd March 2022 objecting to this court's jurisdiction to hear and determine this matter. The objection is premised on Article 162 (2) (b) of *the Constitution*, section 13 of the Environment and Land Act¹ (the ELC Act) and section 101 of the *Land Registration Act*²(the LRA Act).
2. In order to put the objection into a proper perspective, it is necessary to highlight, albeit briefly, the applicant's grievance as disclosed in its pleadings filed. In its substantive motion dated 6th December 2022, the applicant seeks a raft of prayers, namely:- (i) Certiorari to quash the 2nd Respondent's

¹ Act No. 19 of 2011.

² Act No. 3 of 2012.



undocumented decision declining to register an instrument of transfer pursuant to a sale by a chargee in respect of a subdivision, namely number 1285, section 1, Mainland North, Mombasa (CR 14211) from NCBA Bank Kenya PLC to Beatrice Investments Limited; (ii) A declaration that the 2nd Respondent's failure to register the transfer is a violation of its constitutional right to property, fair administrative action and fair hearing as guaranteed under Articles 40 (1) and (2), 47 and 50 of *the Constitution* and sections 4(1), (2) & (3) of the *Fair Administrative Action Act*³(the FAA Act); (iii) An order of prohibition prohibiting the 2nd Respondent from failing, neglecting or refusing to register the said transfer; (iv) Mandamus to compel the 2nd Respondent to register the said transfer; (v) Certiorari to quash the 1st Respondents decision in its letter dated 20th March 2017 addressed to the 2nd Respondent purporting to create a restriction on the property.; (vii) Mandamus directing the 1st Respondent to confirm to the 2nd Respondent that its letter dated 20th March 2017 does not amount to a restriction on the subject properties; and, lastly, (viii) Costs of the application to be borne by the Respondents.

3. The applicant claims that it is the legal owner of the said property having acquired it vide a charge dated 7th April 2015 between by KAAB Investments Limited, APT Commodities Ltd and NIC Bank Ltd as the chargee. It avers that after the borrowers' default in servicing the facility, it exercised its statutory power of sale as provided in the charge instrument and sold the property to a one Beatrice Wanjiku Ikumu t/a Beatriwan Investments Limited by way of a public auction on 9th April 2021 for Kshs. 45,000,000/= . It states that it executed a transfer in favour of the purchaser but the 2nd Respondent illegally refused to register the transfer thereby exposing it to financial harm.

4. In his submissions, counsel for the Interested Party cited *Hotstar Investments Limited v Peter Kuria*⁴ and *Republic v Eldoret Water & Sanitation Company ex parte Booker Onyango & 2 others*⁵ both of which defined a preliminary objection. He submitted that section 101 of the LRA Act provides for the jurisdiction of the Environment and Land Court and the subordinate courts in the following words: -

The Environment and Land Court established by the *Environment and Land Court Act*, 2011 No. 19 of 2011 and subordinate courts has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

5. Fortified by the above provisions, counsel submitted that this court lacks jurisdiction to entertain this matter.

6. The Attorney General representing the Respondents supported the Preliminary objection. He submitted that a perusal of the pleadings reveals that the suit relates to transfer of interest in Land. To buttress his argument, the A.G cited Article 162(2) (b) and 165(b) of *the Constitution*, section 13 of the *Environment and Land Court Act* and Owners of Motor Vessel "S" v Caltex Oil (Kenya) Ltd and urged this court to decline jurisdiction.

7. The applicant opposed the Preliminary objection. Its counsel submitted that this court has jurisdiction arguing that the application is filed under the *Fair Administrative Action Act*⁶ (the FAA Act) challenging the 1st Respondent's decision of placing a restriction over the applicant's property and the 2nd Respondent's failure to register a transfer without giving any written reasons. He submitted that the

³ Act No. 4 of 2015.

⁴ [2019] eKLR.

⁵ [2007] eKLR

⁶ Act No. 4 of 2015.



impugned decision is an administrative action as defined under section 2 of the FAA Act. He argued that section 9 of the FAA Act gives this court the jurisdiction to hear this matter.

8. Counsel submitted that no legal provision excludes the jurisdiction of the High Court to hear and determine this matter. He argued that the FAA Act was enacted in 2015, barely 5 years after the promulgation of the 2010 Constitution and 4 years after the ELC Act were enacted, so Parliament was aware of the existence of the said provisions. Counsel submitted that jurisdiction is determined on the basis of pleadings and not the substantive merits or substratum of the case and cited *Republic v Chief Land Registrar & Another*.⁷ He submitted that the applicant's main objective is to challenge the legitimacy of the procedure undertaken by the Respondents and not the environment and use and occupation of and title to land as set out under Article 162 of *the Constitution*. He submitted that the jurisdiction of the Environment and Land Court can only be invoked in the event a dispute is declared by a party in regards to the provisions of section 13 of the ELC Act. Also, counsel submitted that the Environment and Land Court only has jurisdiction to issue prerogative orders when dealing with issues relating to the substance of a dispute as stated in Section 13 of the ELC Act, but not where the issue is fair administrative action. He argued that there is no dispute as to the applicant's title.
9. Before addressing the substance of the objection before me, I find it fit to address an argument raised by the applicant's counsel who argued that the decision under challenge is an administrative action as defined in section 2 of the FAA Act and therefore this court is vested with jurisdiction as prescribed in section 9 of the FAA Act. Despite hiding behind the said section, counsel never read the entire provision or failed comprehended it. Had counsel done so, he would have realized that section 9 of the FAA Act as demonstrated below erects the greatest barrier to this case. Simply put, section 9 of the FAA Act divests this court of its jurisdiction by creating the doctrine of exhaustion of remedies. This is because the power to review created by section 9 (1) is subject to subsection (2) of the same provision. The section reads: -

9. Procedure for judicial review

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
- (2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
- (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
- (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

⁷ [2019] eKLR.



10. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya.⁸ It was perhaps most felicitously stated by the Court of Appeal⁹ in *Speaker of National Assembly v Karume*¹⁰ in the following words: -

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

11. Undeniably, the above case was decided before *the Constitution* of Kenya, 2010 was promulgated. However, many cases in the post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.¹¹ The Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*,¹² provided the constitutional rationale and basis for the doctrine. it stated: -

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

12. *In the Matter of the Mui Coal Basin Local Community*,¹³ the High Court stated the rationale thus: -

“The reasoning is based on the sound Constitutional policy embodied in Article 159 of *the Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.” *The Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, *the Constitution* creates a Constitutional

⁸ *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR

⁹ Ibid.

¹⁰ {1992} KLR 21.

¹¹ Ibid.

¹² {2015} eKLR.

¹³ {2015} eKLR.



preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

13. Two principles are discernible from the above jurisprudence:- First, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.¹⁴ The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.
14. The applicant's counsel brought an interesting but misdirected argument that the FAA Act was enacted after the ELC Act and the LRA Act and therefore Parliament was already aware of the earlier statutes. This argument collapses not on one but on several fronts. One, it ignores the fact that the FAA Act was enacted to operationalize Article 47 of *the Constitution*, and therefore it enjoys a constitutional underpinning. As alludes to earlier, the argument ignores the opening words of section 9 (1) of the FAA Act which makes the section subject to the next sub-section. It cannot be read in isolation.
15. Section 9(2) of the FAA Act provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
16. The use of the word shall in the above provisions is worth noting. As I have noted in several decisions, the classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.¹⁵ There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.¹⁶ The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.
17. It is the duty of courts of justice to try to get at the real intention of *the Constitution* or legislation by carefully attending to the whole scope of *the Constitution* or a statute to be considered. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory.
18. A proper construction of section 9(2) & (3) above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by 9(4) which provides that:
- "Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust

¹⁴ Ibid.

¹⁵ *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions*. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

¹⁶ Ibid.



any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances.

19. What constitutes exceptional circumstances depends on the facts of each case.¹⁷ Article 47 of *the Constitution* and the FAA Act are heavily borrowed the South African Constitution and their equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions may offer useful guidance. The following points from the judgment of Thring J are relevant: -¹⁸
20. Conceivably, I must hasten to say that there is no definition of ‘exceptional circumstances’ in the FAA Act, but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.
21. Second, on application by the applicant, the court may exempt the person from the obligation. It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the FAA Act. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.¹⁹ Section 9(4) of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.
22. As the applicant’s counsel argued, the impugned decision or failure to act constitutes administrative action as defined in section 2 of the FAA Act. Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the ex parte applicant can show exceptional circumstances to exempt it from

¹⁷ See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

¹⁸ In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H

- i. What is ordinarily contemplated by the words “exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different”
- ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
- iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.
- iv. Depending on the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
- v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional. # In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

¹⁹ See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]



this requirement.²⁰ Talking about an internal remedy, the applicant is aggrieved by a decision to register a restriction against the property. Section 77 of the LRA Act provides for removal and variations of restrictions. It reads:-

23. A reading of the above provision shows that the LRA Act provides for a mechanism for removing a restriction. This mechanism was not exhausted. It has not been argued that this mechanism is not effective. An internal remedy is adequate if it is capable of redressing the complaint.²¹ By now it is manifestly clear that this suit offends the doctrine of exhaustion. On this ground alone, this suit is a non-starter. I dismiss it.
24. Next, I will address the question of jurisdiction. 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 statute, charter, or commission under which the court is constituted imposes the limit of this authority. The authority may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.
25. 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 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 fact exist.
26. Unarguably, 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.²² A court's jurisdiction flows from either *the Constitution*, legislation or both or by principles laid out in judicial precedent.²³ The locus classicus decision in Kenya on jurisdiction is *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*²⁴ where the late Justice Nyarangi JA stated 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.”

²⁰ *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

- (1) The Registrar may, at any time and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.
- (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

²¹ Ibid paras 42, 43 and 45.

²² John Beecroft, *Words and Phrases Legally Defined*, Volume 3:1-N, at Page 113.

²³ The Supreme Court in *the matter of the Interim Independent Electoral Commission*, Constitutional Application No. 2 of 2011 (unreported).

²⁴ {1989} KLR 1.



27. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court²⁵ had this to say:-

“Jurisdiction is determined on the basis of the pleadings,²⁶ ... and not the substantive merits of the case... In the event of the court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction...”

28. The applicant’s grievance is twofold. One, alleged refusal to register a transfer of land. Two, a restriction imposed on the title. The applicant’s counsel correctly argued that jurisdiction is determined by the pleadings. I agree. The above is the grievance before me. For starters, section 2 of the LRA Act defines a “restriction” as an interest registered under section 76 and includes the Registrar’s caveat.”

Restrictions 76. Restrictions.

1. For the purposes of compulsory acquisition, the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
2. A restriction may be expressed to endure—
 - (a) for a particular period;
 - (b) until the occurrence of a particular event; or
 - (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
- (2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.
- 3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

²⁵ *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

²⁶ *Fraser vS ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.



29. Section 2 of the LRA Act defines “interest” as follows: - means a right in or over land. It also defines “registration” as follows: - means bringing of an interest in land or lease under the provisions of the Act and includes making of an entry, note or record in the land register. It defines a transfer as follows: - “transfer” means passing of an estate or interest in land or lease under this Act, whether for valuable consideration or otherwise. By now it is beyond peradventure that a transfer by a charge pursuant to a sale by a public auction is by itself a transfer of an interest in land. So, the question is whether the dispute before me involves an interest in land. Going by the above definitions, the answer is yes.
30. Back to the question of jurisdiction. It is trite that a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written laws.²⁷ Article 165(1) of *the Constitution* vests vast powers in the High Court including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction to hear any question respecting the interpretation of *the Constitution*. Article 23 (1) provides that the High Court has jurisdiction, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
31. The limitation of the vast powers conferred upon the High court under Article 165 is found in Article 165 (5). This provision states in mandatory terms that the high court shall not have jurisdiction in respect of matters: - (a) reserved for the exclusive jurisdiction of the Supreme Court under *the Constitution*; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b). Clearly, this court has no jurisdiction to determine matters falling under Article 162 (2) (2) (a) & (b) of *the Constitution*.
32. But what are these matters? The answer is found in Section 13 of the ELC Act. The preamble to the said act states that it was enacted to give effect to Article 162(2) (b) of *the Constitution*; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes. Section 13 of the ELC Act which provides that: -
- (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.

²⁷ *Samuel Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.



- (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;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs
33. I now go to the basics which to me should be the final nail to the coffin that buries this case. The LRA Act defines a court as follows: -"Court" means the Environment and Land Court established by the *Environment and Land Court Act*, 2011 No. 19 of 2011, and other courts having jurisdiction on matters relating to land. In the same vein, the Land Act defines court as follows: -"Court" means the Environment and Land Court established under the *Environment and Land Court Act*, 2011 (No. 19 of 2011).²⁸Had the applicant read the above statutes properly, it would have thought twice before approaching this court.
34. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2) (b) of *the Constitution* and Section 13 of the ELC Act. The intention of *the Constitution* is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this court has no jurisdiction.
35. The other closely related issue is the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters, which fall within the ambit of the Environment and Land Court. This is clearly provided for under Section 13 (3) of the Act. In addition, sub-section 7 (b) above allows the Environment and Land Court to grant prerogative orders. It follows that the Environment and Land Court can entertain this Judicial Review application challenging the alleged registration of a restriction and refusal to register a transfer of an interest in land.
36. A High court may not determine matters falling squarely under the jurisdiction of the 'status courts' namely the Employment and Labour Relations Court and the Land and Environment Court. Even with that clear-cut jurisdictional demarcation, on numerous occasions, matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the

²⁸ Act No. 6 of 2012.



germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of this case. It falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. I decline the invitation to venture into this forbidden sphere.

37. It is true *the Constitution* guarantees right to access courts. *The Constitution* does not operate in a vacuum. It does not automatically oust other constitutional and statutory provisions brought to life by the legislative arm of government such as the ELC Act. As such, where *the constitution* and legislation expressly confer jurisdiction to a court as in the present case invoking this courts vast jurisdiction will be inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under *the constitution*. Consequently, I find and hold that the jurisdiction of this court in this matter has been improperly invoked. I allow the Preliminary Objection and dismiss this suit.

Orders accordingly. Right of appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY 2022

JOHN M. MATIVO

JUDGE

