



REPUBLIC OF KENYA



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Board of Trustees of the Children Community Society v County Government of Uasin Gishu (Petition 2 of 2020) [2022] KEHC 10918 (KLR) (19 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 2 OF 2020**

OA SEWE, J

MAY 19, 2022

IN THE MATTER OF: ARTICLES 20, 21, 22, 23, 26, 28, 29, 40, 41, 43, 47, 48, 53, 54, 159 AND 165 OF THE CONSTITUTION OF KENYA AND

IN THE MATTER OF: ARTICLES 3, 7, 8, 17, 22, 23 AND 30 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND

IN THE MATTER OF: ARTICLES 2, 3, 6, 23 AND 24 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF A CHILD AND

IN THE MATTER OF: SECTIONS 4, 7, 9, 12, 15 AND 22 OF THE CHILDREN ACT, NO. 8 OF 2001 AND IN THE MATTER OF: RULES 4, 8 AND 10 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE PROCEDURE RULES, 2013.

BETWEEN

BOARD OF TRUSTEES OF THE CHILDREN COMMUNITY SOCIETY PETITIONER

AND

COUNTY GOVERNMENT OF UASIN GISHU RESPONDENT

JUDGMENT

[1] The Petition dated 21st January, 2020 was filed herein by the Petitioner, the Board of Trustees of the Children Community Society, for the following reliefs:-

- (a) A declaration that the Respondent's actions of invading Eldoret Children's Rescue Centre and forceful take-over of the Centre is irregular and the same amounts to an infringement of the Petitioner's rights as well as the rights of its beneficiaries and employees.



- (b) A permanent injunction restraining the Respondent from invading or forcefully taking over the Eldoret Children’s Rescue Centre or in any other way interfering with the ownership, administration and management of the said Rescue Centre.
 - (c) Return of all the documents, records, equipment and compensation for the damages suffered by Petitioner due to the unlawful take-over and interference.
 - (d) Costs of the Petition.
- [2] The Petition was supported by the Affidavit sworn on 21st January, 2021 by Pastor John Ayieko, who described himself as of the Trustees of the Children Community Society. He averred that the Petitioner was duly registered under the Societies Act on the 19th July, 2002; and that it is the proprietor of Eldoret Children’s Rescue Centre, which is situated on a parcel of land owned by the Petitioner known as L.R No. Eldoret Municipality/Block/XI/1132. It was further averred by Pastor Ayieko that the Eldoret Children’s Rescue Centre has been operational since the year 2002; and that it caters for destitute children who have been rescued from the streets or any other harmful environment and who are in need of a safe environment before they can be reconnected with their families, relatives or children homes.
- [3] The Petitioner’s cause of action is that on the 19th December, 2019, the Respondent invaded the Rescue Centre and purported to take over the running, management, records and the properties of the Rescue Centre in contravention of *the Constitution* and the relevant laws of the land. It was further deposed that the Respondent had irregularly, illegally and forcibly detained the documents and other property belonging to the Petitioner and evicted the Petitioner’s employees from the Rescue Centre; and that the Respondent then purported to change the name of the Rescue Centre from Eldoret Children’s Rescue Centre to Uasin Gishu County Government Street Children Rescue Centre.
- [4] Pastor John Ayieko, also averred that the Respondent had admitted adults together with children at the Centre; which is contrary to the laws governing the protection of children. He also deposed that he had received reliable information that the County Government *askaris* had been sexually molesting the girls admitted at the Centre; a matter that had been reported to the Children Officer for appropriate action. He therefore asserted that the Respondent’s actions amounted to an infringement of the Petitioner’s rights, the rights of its employees as well as the rights of the children who are the beneficiaries of the services rendered at the Rescue Centre.
- [5] In particular, Pastor Ayieko pointed out that the Respondent’s actions had hindered donor funding that the Petitioner relied on to run the affairs of the Rescue Centre; and that children who were already under the care of the Eldoret Rescue Centre had been exposed to untold suffering and destitution and were at a risk of missing out on basic needs such as food and education. An example was given, at Paragraph 18 of the Supporting Affidavit of at least three beneficiaries who were then at the University who had failed to secure payment of their school fees after the forceful take-over of the Centre by the Respondent.
- [6] According to Pastor Ayieko, there was no justification for the takeover of the Rescue Centre by the Respondent. He posited that it was a malicious attempt by the Respondent to interfere with the Petitioner’s internal affairs. He added that, if indeed the Respondent was in need of a Rescue Centre, it was at liberty to open its own rather than take over the Petitioner’s. Thus, the Petitioner urged that its Petition be allowed and the reliefs prayed for granted.
- [7] The Respondent opposed the Petition vide a Replying Affidavit sworn on 30th January, 2020 by Joseph Kurgat, the County Executive Committee Member, Education, Culture, Youth Affairs, Sports and Social Services. He deposed that Pastor John Ayieko had no locus standi to bring the instant



Petition before court without the authority of the Board of Trustees. Mr. Kurgat further averred that the instant Petition is an oxymoron and a contradiction in terms as the Petitioner's composition is inclusive of the Respondent. He therefore averred that the Petition is untenable as presented. He further deponed that the Petition herein does not set out, with sufficient particularity, the allegations of breach of the Constitution by the Respondent as to justify the grant of any of the reliefs prayed for.

- [8] Regarding the history of the Centre, Mr. Kurgat averred that the Eldoret Children's Rescue Centre was established in the year 1993 in line with the Presidential Directive of 1991, which commanded that rehabilitation centres be established in all districts in the country to cater for children living under difficult circumstances, in an effort to resolve the emerging problem of street children in most urban centres. He added that the District Children Advisory Committee (DCAD) for Uasin Gishu District (as it then was) appointed a manager for the Eldoret Children Rescue Centre, one Michael Nieswand, whose term was terminated on the 2nd August, 2001.
- [9] Mr. Kurgat explained that after the termination of Michael Nieswand's term, and after consultation between the District Children Advisory Committee (DCAD) and stakeholders, a Board of Trustees, to wit the Children Community Trustees, was established with full mandate to run the affairs of the Centre. He averred that the Board of Trustees formally took over management of the Centre on 1st October, 2001, whereupon a Management Committee was appointed to oversee the daily operations of the Centre; and that on 14th January, 2002 an Assignment and Management Agreement was entered into between the Children's Community Trustees and the Government of Kenya through the District Commissioner, Uasin Gishu District, Rift Valley Province (as it then was). The Trustees included: Peter Otieno Agwa, William John Alexander Green, Richard Harrison Koetz, Thomas Kibet Kogo, Cornelius Kipng'eno Arap Korir, Joshua Nzyoka Mbithi, Rose Wangare Mbugua, Samuel Ayaya Olwambula, Alan Edward Perry, Ely Kipkemboi Rop and Geoffrey Kipkemboi Songok.
- [10] At Paragraph 13 of the Replying Affidavit, Mr. Kurgat deposed that, through the Assignment and Management Agreement, the Children's Community Trustees were to hold a parcel of land measuring approximately 2 Hectares described as Plot 'A' in the letter of allotment dated 27th April, 1994, in trust for Eldoret Children's Rescue Centre. It is stated that another parcel of land measuring approximately 4.80 Hectares described as Plot 'C' in the letter of allotment dated 27th April, 1994 was to be held by the Children's department in trust for the Children Rescue Primary School.
- [11] Mr. Kurgat averred that this explains why the above parcels of land were registered in the names of some of the Trustees, namely, Mr. Cornelius Kipng'eno Arap Korir, Mr. Allan Edward Perry and Mr. John Ayieko; and a Certificate of Lease issued on the 14th August, 2009 in their names in trust for the Eldoret's Children Rescue Centre and Children Rescue Primary School, as is manifest in the consent to transfer issued by the Eldoret Municipal Council to the District Commissioner Uasin Gishu District dated 12th September, 2001. It was also pointed out that whereas Bishop Cornelius Kipngeno Arap Korir has since died, the whereabouts of Mr. Perry remain unknown.
- [12] At paragraphs 17, 18 and 19 of the Replying Affidavit, Mr. Kurgat averred that since attempts to register the Trust with the Registrar of Societies faced challenges, they resorted to having the Petitioner registered as a Children's Community Society on the 19th July, 2002. The Trust was also registered as a Charitable Children's Institution with the Ministry of Home Affairs for a period of three years from May, 2007 to May, 2010; which registration has since expired. In addition, the Centre was registered on the 30th September, 2009 as a Non Formal Education Centre through the Ministry of Education both in Eldoret and Nairobi as Eldoret Children's Rescue Centre Self Help Group with the Ministry of Gender, Children and Social Development for purposes of funding.



- [13] It was the assertion of Mr. Kurgat, on behalf of the Respondent, that all along, the defunct Uasin Gishu Municipal Council maintained its membership in the Board of Trustees; which position was taken up by the County Government of Uasin Gishu, the Respondent herein, after the promulgation of the *Constitution of Kenya, 2010*. He therefore stated that the Respondent is a key stakeholder as a donor and a permanent representative in the Board of Trustees and in the Management Committee of the Rescue Centre. Mr. Kurgat added that, as matters stand, the respondent's County Executive Committee Member in charge of Education, Culture, Youth Affairs, Sports and Social Services is the chair of the Board of Trustees; while the County Director of Social Services and Sub-County Children Officer-Turbo Sub County, sits in the Management Committee. He consequently posited that it cannot be said that the Petitioner is the proprietor of the Rescue Centre; neither can it be said that the Respondent is a stranger to the operations of the Centre.
- [14] At paragraph 25 of the Replying Affidavit, Mr. Kurgat averred that, following numerous complaints against the Centre's Management Committee; which complaints included discrimination and theft of items donated to the Centre, a task force was formed to investigate the allegations. A report was thereafter compiled in accordance with Section 40 of the *Children Act, 2001*; which revealed that the Centre's Manager had not been accountable on matters pertaining to the daily affairs of the Centre as there were several incidents of misappropriation and mishandling of funds. He further stated that, as investigations intensified, the Manager deserted duty and abandoned the Centre; and that as a result, some donors have since withdrawn their support, posing immense challenges in the sustenance of the Centre. He deposed that, at that point, the Respondent took up funding of the day to day affairs of the Centre, including but not limited to building of a perimeter wall worth approximately Kshs. 10,000,000/= and spending over Kshs. 100,000,000/= in rehabilitating the Centre; as well as providing necessary facilities including food, bedding and clothing for the children.
- [15] Thus, Mr. Kurgat averred that the accusation that the Respondent invaded the Rescue Centre that it has, from time to time assisted after it was abandoned by its Manager, is not only far-fetched but also a weak attempt to paint the Respondent in bad light. He denied that the Respondent issued a communicate directing donors to stop supporting the Centre; or that it made an attempt to change the name of the Centre. In the same vein, Mr. Kurgat denied that the Respondent admitted adult children to the facility or that its *askaris* have been sexually molesting the girls admitted at the Centre, as no such reports have been made to the Police Post situate at the Centre itself or any other police station for that matter. Mr. Kurgat made reference to the documents annexed to his affidavit in support of his assertions and concluded his affidavit by stating that the Petitioner is not deserving of the prayers sought in the Petition. He consequently prayed that the same be dismissed with costs to the Respondent.
- [16] The Petition was canvassed by way of written submissions pursuant to the directions issued herein on 2nd March 2021. Thus, the written submissions of the Petitioner were filed herein on the 20th April, 2021 by M/s Kenei & Associates in which the following three issues were proposed for determination:
- (a) Whether the instant Petition meets the threshold for a constitutional petition;
 - (b) Who is the owner of the Eldoret Children's Rescue Centre;
 - (c) Whether the Respondent has a right to take over the Rescue Centre; and,
 - (d) What is the best interest of the children who are the beneficiaries of the Rescue Centre?
- [17] In respect of the first issue, Mr. Kenei submitted that the instant Petition meets the threshold of a constitutional petition, and therefore warrants the intervention of the Court for purposes of Article 165(3)(d) of the Constitution. He relied on *Media Group Limited v Attorney General* [2007] 1 EA 261 and *Anarita Karimi Njeru v Republic* [1979] eKLR for the proposition that the Court is merely



required to weigh the probability of an infringement; and that it should be concerned with substance rather than technicalities. Counsel further submitted that the Petitioner herein is a person for purposes of the Bill of Rights and made reference to Article 260 of *the Constitution* for the definition of a person; which includes a company, association or other body of persons whether incorporated or unincorporated. He added that the constitutional breaches and infringements complained of have been well elaborated; namely that the acts of the Respondent are an affront to the proprietary rights of the Petitioner, its employees and the children who are beneficiaries of the Rescue Centre.

- [18] In particular, counsel pointed out that the children at the Centre are entitled to free and compulsory free education, shelter, health, nutrition and protection from abuse and neglect as safeguarded under Article 53 of the Constitution. He therefore argued that the forceful invasion of the Rescue Centre is not only an infringement of the rights aforementioned, but also amounted to a breach of the right of the Petitioner to privacy. Mr. Kenei further argued that, in forming a task force to carry out investigations at the Centre without informing the Petitioner or giving any reasons for such an action, the Respondent breached Article 47 of *the Constitution*, which safeguards the right to fair administrative action. He accordingly urged the Court to find that the Petition meets the threshold for a constitutional petition.
- [19] With regard to ownership of the Rescue Centre, which in his submission is the core issue in this Petition, Mr. Kenei submitted that the land on which the Centre is situate, L.R. No. Eldoret Municipality/Block XI/1132 belongs to the Petitioner; and that the Petitioner enjoys a 99-year Lease from the Government of Kenya which shall lapse in 2093. He consequently urged the Court to find that the Respondent has no right at all to the said property; the lessor being the National Government of Kenya. He relied on Section 24 of the /akn/ke/act/2012/3 Land Registration Act, 2012 and the cases of *Joseph N.K. Ngok v Justice Moijo Ole Keiwua & 4 Others*, Civil Application No. 60 of 1996 and *Wreck Motor Enterprise v The Commissioner of Land & Others* in urging the Court to dismiss the Respondent's contention that the Rescue Centre is situated on public land.
- [20] At paragraph 20 of his written submissions, Mr. Kenei underscored his argument that the registration of the Rescue Centre by the various Government entities in favour of the Petitioner clothed it with proprietary rights over the Centre. He pointed out that the Petitioner has invested its assets in developing and maintaining the Centre; and therefore that, as a regulator and overseer, the Respondent acted in breach of Article 40 of the Constitution in taking over the institution as it did.
- [21] Counsel for the Petitioner referred to the case of *R v Chief Immigration Officer* [1976] 3 ALLER 843, wherein the court held that the right to own property is a universal right fortified under the Universal Declaration of Human Rights [1948]. He consequently argued that the takeover of the Rescue Centre by the Respondent ought to be seen as the highest level of impunity; and therefore ought to be undone forthwith. In this regard, counsel relied on the case of *Arnacherry Limited v Attorney General* [2014] eKLR in which such a forceful take-over was deprecated as an act of impunity.
- [22] On what is in the best interest of the children in respect of whom the Rescue Centre was created in the first place, Mr. Kenei hinged his arguments on Article 53(2) of the Constitution and Section 4(3) of the {/akn/ke/act/2001/8 Children Act in urging the Court to adopt a course that will safeguard and promote the rights and welfare of the child. He relied on *MA v ROO* [2013] eKLR to underscore the proposition that the targeted children are entitled to shelter, food, clothing, education and medical care; all of which the Centre has been endeavouring to provide to children rescued from harmful environment. He posited that the Respondent is unable to sustain the provision of services at the Centre without donor support; and therefore that the best interest of the children is in the Rescue Centre being given back to the Petitioner; and the Petitioner being given a free hand to run the institution. Thus, Mr. Kenei urged the Court to allow the Petition with costs to the Petitioner.



- [23] On his part, Mr. Mwangi for the Respondent proposed the following issues for determination vide his written submissions dated 7th June 2021:
- (a) Whether John Ayieko has locus standi to bring the Petition on behalf of the Petitioner;
 - (b) Whether this Court has jurisdiction to determine the questions of ownership and use of the property on which the Rescue Centre sits;
 - (c) Whether the Petition meets the threshold of a constitutional petition;
 - (d) Whether there has been take-over of the Rescue Centre by the Respondent; and,
 - (e) Whether the Petitioner is deserving of the orders sought.
- [24] Mr. Mwangi submitted that, since John Ayieko instituted the Petition without the authorization of the Petitioner through a resolution, the Petition is incompetent. He pointed out that Mr. Ayieko, not being a trustee ought to have demonstrated that he had the requisite authority of the Board to file the Petition. Counsel relied on Petition No. 600 of 2013: *East African Portland Cement Limited v Capital Markets Authority & 4 Others* in urging the Court to strike out the Petition without further ado.
- [25] It was also the submission of Mr. Mwangi that the Court does not have the jurisdiction to determine the central issue of ownership and use of the land on which the Rescue Centre is established. He relied on Section 13 of the Environment and Land Act and the case of *Julius N. Mwoni & 7 Others (on behalf of other residents of Mwingi Sub County) v Kenya Electricity Transmission Company Limited* [2018] eKLR to support his argument that the court with jurisdiction is the Environment and Land Court.
- [26] On whether the Petition meets the threshold of a constitutional petition, Mr. Mwangi reiterated his assertion that the issues in controversy in this Petition relate to the management of the Rescue Centre and the question of ownership of the land on which the Centre is situated. He therefore submitted that those issues are not of such a nature as to warrant the invocation of the Court's jurisdiction under Article 165(3)(b) of the Constitution. He likewise relied on *Anarita Karimi Njeru v Attorney General* (supra) and *Mumo Matemu v Trusted Society fo Human Rights Alliance* [2014] eKLR as to the need for precision in the drafting of the Petition.
- [27] Further to the foregoing, Mr. Mwangi submitted that it was not sufficient for the Petitioner to allege violations; and that it was under duty to prove by way of evidence that its rights were either indeed violated as alleged or threatened with violation. Counsel relied on *Siaya County Public Service Board v County Assembly of Siaya & another* [2020] eKLR and *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR for the proposition that decisions on violation of constitutional rights cannot be based upon unsupported hypothesis.
- [28] On whether the Respondent has taken over or attempted to interfere with the ownership, management and administration of the Rescue, counsel underlined the fact that the Respondent has been a stakeholder in the rescue Centre with permanent representation at the Petitioner's Board of Trustees. He added that the current Chairperson of the Petitioner is a representative of the Respondent; and that *the Constitution* of the Society provides that the County Children Officer be included as an *ex officio* member (with voting rights) of both the Board of Trustees as well as the Management Committee. Hence, Mr. Mwangi urged the Court to dismiss the argument by the Petitioner that the Respondent acted in breach of *the Constitution*, yet it was merely discharging its mandate as by law defined. He also submitted that the Assignment and Management Agreement does not give individual trustees the right to own the parcels of land belong to the Rescue Centre.



- [29] Lastly, counsel submitted that the effect of granting a permanent injunction against the Respondent would be unfortunate, as it would stop the Respondent from taking care of needy children; and therefore a negation of the initial intention of setting up the trust. Hence, the Court was urged to dismiss the instant petition with costs as it goes against the best interest of the children in whose behalf the Rescue Centre was established.
- [30] Having considered the Petition, Replying Affidavit and written submissions filed herein by the parties, it is manifest that most of the facts are not in dispute. In their written submissions, learned counsel for the parties have aptly summarized the agreed facts; and they are that the Petitioner is a charitable trust created for the sole purpose of running the Children Community Society. It was registered on 19th July 2002 and issued with a Certificate of Registration No. 21583 under the Societies Act, Chapter 108 of the Laws of Kenya, exhibited at pages 45 and 79 of the Respondent’s Replying Affidavit.
- [31] The parties are further in agreement that, pursuant to the Assignment and Management Agreement dated 14th January 2002 (exhibited at ages 46 to 49 of the Respondent’s Replying Affidavit), between the Petitioner and the Government of Kenya, the Petitioner was mandated to establish Eldoret Children’s Rescue Centre; whereupon it was allocated two parcels of land by the Government. At the time, the two parcels were simply referred to as Plots A and C. The Leases for the parcels of land were later executed on 29th May 2009 by the then Commissioner for Lands, Mr. Zablun Agwata Mabea in favour of the Petitioner. The property became known as Eldoret Municipality/blockxi/1132. It is therefore common ground that the Petitioner established the Rescue Centre in the year 2002 on the above-mentioned parcel of land and has been operating it since then.
- [32] The point of departure is the question whether the Respondent invaded and forcefully took over the operations of the Rescue Centre on 19th December 2019 as alleged by the Petitioner; because this is what triggered the filing of this Petition. It is worth mentioning at this point that, upon being persuaded by the Court, the parties engaged in negotiations that yielded a Consent Order dated 5th February 2020. The Consent was endorsed as part of the proceedings of the Court on 6th February 2020 thus:

“By consent of both parties herein:

1. The signage/signpost at the Rescue Centre be reverted back to the proper name of the Centre being Children’s Community Society – Eldoret Children’s Rescue Centre within seven (7) days from the date of this consent;
2. The allegations on the molestation of the children by the County Government Askaris be subjected to investigations by the Directorate of Criminal Investigations and a Report be filed before this Honourable Court;
3. The Respondent to pay school fees for the two University students being Daniel Kamau Kage and Derrick Kibet within seven (7) days from the date of this consent;
4. The Respondent to ensure retention at school of all the other children from the Rescue Centre pending conclusion of negotiations;
5. The first instance admission at the Rescue Centre is exclusive to persons under the age of 18 years (minors) and no adult should, at first instance, be admitted at the Centre;
6. The admission at the Centre shall only be permitted pursuant to an order from a court of law;



7. The two employees allegedly thrown out to resume their work with effect from 5th February 2020;
8. The parties to have a further meeting on 28th February 2020 to deliberate on the remaining issues; and
9. The matter to be mentioned immediately after 28th February 2020 for the parties to report back to the Honourable Court on the progress of negotiations.”

[33] The parties were in agreement that the Consent Order aforementioned disposed of quite a number of the issues in contest in this Petition. The parties were however unable to agree on the thorny issue of the alleged takeover by the Respondent and by extension the ownership of the Rescue Centre and the land on which it is situated. In the premises, the issues that fall for determination, as correctly suggested by learned counsel for the parties are:

- (a) Whether this Court has jurisdiction to determine the questions of ownership and use of the property on which the Rescue Centre sits;
- (a) Whether John Ayieko has locus standi to bring the Petition on behalf of the Petitioner;
- (c) Whether the Petition meets the threshold of a constitutional petition;
- (d) Who is the owner of the Eldoret Children’s Rescue Centre and whether there has been take-over of the Rescue Centre by the Respondent; and,
- (e) Whether the Petitioner is deserving of the orders sought and what is in the best interest of the children who are the beneficiaries of the Rescue Centre.

[34] Needless to say that the issue of jurisdiction can be raised at any stage of the proceedings; even on appeal. The Court of Appeal made this clear in *Kenya Ports Authority v Modern Holding [EA] Limited* [2017] eKLR, thus:

“We have stressed the jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard.”

[35] And, when thus raised, the Court is obliged to make a determination thereon before turning attention to the merits of the matter before it; for without jurisdiction the Court would be acting in vain. This fact was underscored by Hon. Nyarangi, JA, in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR thus:

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”



[36] And, in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held that:

“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 by law. We agree with counsel 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 on 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.”

[37] From the written submissions filed by Mr. Kenei, there is no doubt as to the centrality of the question of ownership of the land on which the Rescue Centre is situated. At paragraphs 3, 4 and 5 of his written submissions dated 20th April 2021, Mr. Kenei gave what he considered to be pertinent details surrounding the ownership of L.R. Eldoret Municipality/Block XI/1132 and pointed out that one of the fundamental rights the Petitioner is seeking enforcement of is the right to own property under Article 40 of *the Constitution*. Then, at Paragraphs 15 to 20 he discussed the question, who is the owner of Eldoret Children’s Centre? Which, in his submission is inseparable from the question as to who owns the parcel of land on which the Centre is situated. It was in this connection that Mr. Kenei relied on *Joseph N.K. Arap Ngok v Justice Moiwo Ole Keiuwa & 4 Others* (supra), in which the Court of Appeal held that:

“It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions of the Act under which the property is held.

Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

[38] At paragraph 19 of his written submissions, Mr. Kenei posited that the land is held by the Petitioner under a Leasehold and therefore as private property for purposes of Article 64 of the Constitution. It was therefore on the foregoing parameters that the Court was invited to determine the issues arising in this Petition.

[39] The jurisdiction of the High Court is provided for under Article 165(3)(a) of *the Constitution* which stipulates that:

Subject to clause (5), the High Court shall have-



- a) Unlimited original jurisdiction in criminal and civil matters;

[40]** Article 165(5) of *the Constitution* on the other hand, provides that:

- (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).

[41] Section 13 of the *Environment and Land Court Act*, 2011, an Act of Parliament enacted pursuant to Article 162(2) of *the Constitution* is explicit 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 interest in land; and
 - e) any other dispute relating to environment and land.

[42] It is plain therefore that issues to do with ownership and title are matters that fall within the jurisdiction of the Environment & Land Court, notwithstanding that the issues may have a constitutional perspective to them. Indeed, Section 13(3) and (4) of the Environment and *Land Act* provides that:

- 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 health 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.

[43] Accordingly, in *Delmonte Kenya Limited v County Government of Murang'a & Another* [2019] eKLR a multiple bench of the High Court held that:

- “89. In the end we find and hold that the dominant issue in the petition is the right to renewal of leases over the suit land. We further find that the issue is intrinsically connected to the use and title to land. The dispute thus falls squarely within the purview of the ELC under Article 162(2) of *the Constitution* as read with Section 13 of the ELC Act. We also find that although the petitioner claims violation of various constitutional rights, those claims are



intertwined with the dominant issue and that the ELC has jurisdiction to deal with the alleged violations.”

[44] Likewise, in *Republic v Chief Land Registrar & another* [2019] eKLR Hon. Mativo, J., being of a similar view, held that:

- “ 14. 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 *Environment and Land Court Act*. In this regard, my view is that 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. My strong view is that this suit ought to have been transferred to the proper court the moment *the Constitution* of Kenya 2010 divested this court the jurisdiction to hear the case. Buttressed by the provisions of *the Constitution* and section 13 of the *Environment and Land Court Act*, I am clear in my mind that this court cannot properly entertain the application before me.
15. It is beyond argument that a High Court may not determine matters falling squarely under the jurisdiction of the Employment and Labour Relations Court and the Land and Environment Court, whether it is a substantive hearing or an application such as the instant application.
16. Even with that clear-cut jurisdictional demarcation on paper, sometimes 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 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 the application before me. A boundary dispute or enforcing an order relating to a boundary dispute falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of *the Constitution* were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status.
17. Where *the constitution* and legislation expressly confers jurisdiction to a court as in the present case, invoking this courts vast jurisdiction is inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under *the Constitution*. On this ground, I dismiss the Application dated 26th February 2018.”

[45] It is clear from the foregoing that, as the dominant issue in this matter is the question of proprietorship of the piece of land on which the Rescue Centre is situated, the competent court to determine the suit herein is the Environment and Land Court. There is no doubt that the Environment and Land Court has a broad constitutional jurisdiction and to make any order or grant any relief it deems fit and just, including the reliefs sought in this Petition. It is on that account that I hereby strike out the Petition dated 21st January, 2020 with an order that each party shall bear own costs thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF MAY 2022.



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OLGA SEWE
JUDGE

