



**Migwi v Inspector General, National Police Service & 4 others; Kawira (Interested Party)
(Environment & Land Petition 1 of 2023) [2023] KEELC 18431 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 18431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 1 OF 2023**

**JO MBOYA, J
MAY 18, 2023**

BETWEEN

ANTHONY KAMAU MIGWI PETITIONER

AND

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 1ST RESPONDENT

**OFFICER COMMANDING STATION, KASARANI POLICE
STATION 2ND RESPONDENT**

DIRECTOR OF CRIMINAL INVESTIGATION 3RD RESPONDENT

ATTORNEY GENERAL OF KENYA 4TH RESPONDENT

THE CHIEF MAGISTRATE – MILIMANI LAW COURTS 5TH RESPONDENT

AND

DOREEN KAWIRA INTERESTED PARTY

RULING

Introduction And Background

1. The Petitioner/Applicant herein filed and/or lodged the Petition dated the 9th day of February 2023, and in respect of which same has sought for a plethora of reliefs, principally as against the Respondent.
2. Given the nature of the Reliefs sought at the foot of the Petition and coupled with the significance that the said reliefs shall have in the determination of the question of Jurisdiction, it is thus imperative that the reliefs sought be itemized.
3. Instructively and for good measure, the reliefs sought at the foot of the Petition are as hereunder;



- i. Declaration that it is unlawful, arbitrary, unfair, unconstitutional and against the principles of fair administrative action and principles of natural justice for the Respondents to use their offices to deprive the Applicant his property and give possession to the Interested Party.
 - ii. Declaration that the Respondents and/or their agents, servants or howsoever by arresting, detaining and charging the Petitioner have violated the Petitioner's right to ownership of property, dignity and protection as provided under Article 28 and 40 of the Constitution.
 - iii. An order of Injunction directed at the Respondents their servants or agents or proxies or any other person acting under their instructions from further arresting the Petitioner, his family and workers when there is a prior civil suit namely Milimani CMELC Case No. E400 of 2022 or any matter connected with ownership of Nairobi Block 110/181 and Plot No. 642 Share Certificate 120 situate in Nairobi.
 - iv. An order of Injunction directed at the Respondents their servants or agents or proxies or any other person acting under their instructions from further arresting the Petitioner, his family and workers and charging them on allegation of forcible detainer and the continuance of any other criminal proceedings relating to Nairobi Block 110/181 and Plot No. 642 Share Certificate 120 situate in Nairobi.
 - v. That Leave granted do operate as stay of the Respondents intended action.
 - vi. That costs of the suit be provided for.
 - vii. Any other order or prayer this Honourable court may deem fit and just to grant.
4. Contemporaneously with the filing of the Petition, the Petitioner/Applicant also took out and filed a Notice of Motion Application dated the 9th February 2023; and in respect of which same sought for the following reliefs;
- i.Spent.
 - ii.Spent.
 - iii.Spent.
 - iv. That pending the hearing and determination of this Petition, the Honourable Court be pleased to issue a Conservatory Order by way of injunction restraining the Respondents by themselves, their agents and servants from arresting the Applicant, his family and workers when there is a prior civil suit namely Milimani Cmelc Case No. E400 OF 2022 or any other criminal matters connected with ownership of Nairobi Block 110/181 and Plot No. 642 Share Certificate 120 Situate In Nairobi.
 - v. That costs of the Application herein be borne by the Respondents.
5. Upon being served with the subject Application, the Interested Party filed a Replying affidavit sworn on the 13th March 2023; and in respect of which same has made various averments, *inter-alia* that the Certificate of title which the Petitioner/Applicant alludes to was procured and obtained by fraud.
6. On the other hand, the Interested Party has similarly filed an Application of its own and same is dated the 13th March 2023. In this regard, the Interested Party has sought for *inter-alia* orders of Temporary Injunction as against the Petitioner, irrespective of the fact that the Interested Party herein has not filed any substantive pleadings or otherwise.



7. For good measure, even though the Respondents were duly served with the Petition and the Notice of Motion Application seeking for Conservatory orders; same have neither filed any Response, either to the Petition or the Application.
8. Be that as it may, the subject Application came up for hearing on the 7th March 2023; whereupon the Honourable court issued and gave directions pertaining to the manner of hearing and disposal of the Application. For coherence, it was ordered and directed that the subject Application be canvassed by way of written submissions to be filed and exchanged by the Parties within set timelines.

Submissions By The Parties:

A. Applicant's Submissions:

9. The Applicant herein filed written submissions dated the 20th March 2023; and in respect of which same has raised, highlighted and canvassed three issues for consideration and ultimate determination by the Honourable court.
10. Firstly, Learned counsel for the Applicant has submitted that the Applicant's Constitutional Rights and Fundamental Freedoms have been breached, violated and infringed upon by the Respondents and the Interested party, respectively.
11. In addition, Learned counsel for the Applicant has submitted that at the instance and instigation of the Interested Party, the Respondents herein and in particular the 1st to 3rd Respondents, have subjected the Applicant to arbitrary arrest, albeit without lawful and or reasonable cause, whatsoever.
12. Furthermore, learned counsel has added that the arbitrary arrest, to which the Applicant has been subjected to, are calculated to intimidate and cow the Applicant from partaking of and enjoying his proprietary rights over and in respect of L.R No. Nairobi Block 110/181 and Plot No. 642, Share Certificate 120; situate in Nairobi.
13. In view of the foregoing, Learned counsel for the Applicant has therefore contended that the impugned arrest, which are stated to be arbitrary have thus violated the Applicant's Rights and Fundamental Freedoms as entrenched in Articles 27, 29 and 47 of the Constitution 2010.
14. Secondly, Learned counsel for the Applicant has submitted that the manner in which the Applicant is being treated does not bode well with the provisions of the Constitution and fundamental rights; and therefore there is urgent need for the court to intervene by granting a conservatory order to prohibit further arbitrary arrest.
15. Additionally, Learned counsel for the Applicant has submitted that unless the conservatory orders sought are issued, then the Applicant herein shall be exposed to grave violations of his fundamental rights and freedoms.
16. In respect of the prayer for issuance of conservatory orders, Learned counsel for the Applicant has invoked the provisions of Articles 22 and 23 of the Constitution 2010. For coherence, Learned counsel has contended that it behooves the court to ensure that the constitutional rights and fundamental freedoms of the Applicant are not breached and violated.
17. Moreover, Learned counsel has thereafter ventured to itemize the ingredients that ought to be established, demonstrated and proved before a conservatory order can issue. In this respect, counsel has contended that it was incumbent upon the Applicant to show that there is a *prima facie* case, a degree of prejudice as a result of the violation, show that the grant of the conservatory order shall enhance the constitutional values and objects specific to the right of freedoms in the Bill of Rights



show that the conservatory order would protect the substratum of the petition and establish that the issues complained of are of public importance.

18. Having itemized the ingredients which are said to be important and critical for the grant of a conservatory order, Learned counsel has thereafter cited and relied on various decisions, *inter-alia*, the case of [Gitarau Peter Munya v Dickson Mwenda Githinji & 2 Others](#) (2014)eKLR, [Wilson Kaberia Mkunja v The Magistrate's & Judges Vetting Board & Others](#) (2016)eKLR, [Center for Rights Education & Awareness \(CREAW\) & 7 Others v The Attorney General](#) (2011)eKLR, [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) (2003)eKLR, [Simeon Kioko Kitheka & 18 Others v The County Government of Machakos & 2 Others](#) (2018)eKLR and [Law Society of Kenya v Office of The Attorney General & Another; Judicial Service Commission \(Interested Party\)](#) (2020)eKLR.
19. Lastly, Learned counsel for the Applicant has submitted that the Interested Party herein, who has been impleaded merely as an Interested Party, cannot purport to file and originate an application seeking for precipitate orders of injunction, either as sought at the foot of the Application dated the 13th March 2023 or at all.
20. Premised on the submissions that an Interested Party cannot raise and or generate own issues for determination, Learned counsel for the Applicant has thus implored the Honourable court to decline to entertain and adjudicate upon the Application dated the 13th March 2023.
21. To vindicate the submissions, that an Interested Party cannot generate and raise own issues for determination, Learned counsel has cited and relied on the decision in the case of [Francis Kariuki Muruatetu & Another v Republic & 5 Others](#) 92016)eKLR.
22. In view of the foregoing, Learned counsel for the Applicant has thereafter implored the Honourable court to file and hold that same has proved and established the requisite basis to warrant the grant of a Conservatory order.

B. Interested Party's Submissions:

23. The Interested Party filed written submissions dated the 4th April 2023; and in respect of which Learned counsel has raised, highlighted and canvassed two (2) salient issues for consideration and determination by the court.
24. Firstly, Learned counsel for the Interested Party has submitted that the Applicant herein has neither established nor demonstrated any justifiable basis upon which a conservatory order ought to issue and/or be granted.
25. In addition, Learned counsel has contended that a conservatory order is a grave order and therefore same must only be issued where the Applicant has proved and established *inter-alia* that same has a *prima facie* case and that the failure to grant the conservatory order may result into breach and/or infringement of the Applicant's fundamental rights and freedoms.
26. Nevertheless, Learned Counsel has added that the Applicant herein has neither established nor demonstrated any of the requisite ingredients that undergird the issuance of a conservatory order.
27. In support of the submissions that the Applicant herein has neither established nor proved the requisite ingredients to warrant the grant of a conservatory order, Learned counsel has cited and relied on various cases, *inter-alia*, the case of [Invesco Assurance Company Ltd v M W \(Maina Suing through next friend and mother \) \(H W\)](#) (2016)eKLR, [Judicial Service Commission v The Speaker National Assembly & Another](#) (2013)eKLR, Ibrahim J (as he then was) in [Muslim for Human Rights & 2 Others](#)



v The Attorney General & 2 Others (2011)eKLR and *Speedex Logistics Ltd & 2 others v The Director of Criminal Investigations & 2 others* (2018)eKLR, respectively.

28. Secondly, Learned counsel has submitted that the fact that there is a pending Civil Suit, touching on and concerning ownership of the suit property, does not by itself mean that the Applicant herein cannot be investigated and/or charged with a criminal offense pertaining to and arising out of the circumstances in which the impugned certificate of title was acquired.
29. Invariably, Learned counsel has submitted that there is no constitutional or legal bar to the filing and commencement of criminal proceedings against the Applicant, at the same time with the prosecution of a civil suit. In any event, Learned counsel has pointed out that only circumstances where criminal proceedings can be halted and aborted, is where same is being used to achieve ulterior purposes.
30. However, in respect of the subject matter Learned counsel for the Interested Party has submitted that there is no iota and/or scintilla evidence that there was bad faith or ulterior motives in the lodgment of the criminal complaint and the investigations commenced and carried out by the 1st to the 3rd Respondents.
31. As a result of the foregoing, Learned counsel for the Interested Party has therefore submitted that the Applicant's Application is not only misconceived, but legally untenable.

Issues For Determination

32. Having reviewed the Petition dated the 9th February 2023, the Notice of Motion Application of even date and the Replying affidavit and the Further affidavit, respectively; and having taken into account the written submissions filed on behalf of the Parties, the following issues do arise and are thus pertinent for determination;
 - i. Whether the Petition and the attendant Application fall with the Jurisdiction and mandate of the Environment and Land court.
 - ii. Whether the Applicant herein has established and demonstrated that his Rights and Fundamental freedoms as enshrined in the *Constitution*, 2010 have been breached, violated and /or infringed upon.

Analysis And Determination

Issue Number 1. Whether The Petition And The Attendant Application Fall With The Jurisdiction And Mandate Of The Environment And Land Court.

33. The Applicant herein has contended that same is the lawful owner of L.R No. Nairobi Block 110/181 Plot 642, Share Certificate 120, situate in Nairobi, wherein same has (sic) been residing with his family.
34. In addition, the Applicant herein has averred that around January 2023, the Interested Party herein lodged and/or mounted a complaint with the 1st to 3rd Respondent, wherein the Interested Party purported that same has illegally entered upon and detained the suit property.
35. Arising from the foregoing, the Applicant has thus averred that the 1st to 3rd Respondents thereafter caused him to be arrested and detained on various occasions, albeit without any lawful or reasonable cause. In any event, the Applicant has contended that the arrest complained of are arbitrary and merely aimed at intimidating same to forgo his rights and entitlement to the suit property.
36. In the premises, the Applicant herein has thus approach this Honourable court on the basis of the current Petition and same has contended that the Respondents herein and the Interested Party, have



breached and violated his rights and fundamental freedoms as espoused vide Articles 27, 28, 40 and 43 of the Constitution, 2010.

37. Having made the foregoing averments, the Applicant has therefore sought for a conservatory order whose purposes is (sic) to avert any further arbitrary arrest, detention, charging and prosecution of the Applicant over and in respect of issues arising from ownership of the suit property.
38. From the body of the Petition, there is no gainsaying that the Applicant herein is no seeking for any orders touching on declaration that same is the lawful and legitimate proprietor of the suit property. Further and in addition, the Applicant herein has also not sought for any order seeking to speak to his rights to occupy and use the suit property.
39. Contrarily, what the Applicant has sought is that the Respondents herein and more particularly the 1st to 3rd Respondents, have subjected same to arbitrary arrest, detention and threatened to prosecute the Applicant (sic) on the basis of the allegations pertaining to the manner in which same acquired the suit property.
40. In any event, to be able to appreciate the true nature of the Applicant's Petition, it is imperative to take into account the persons who have been impleaded as the Respondents. Instructively, the Applicant herein cannot purport that same has a land dispute between himself and the Respondents, who are the principal players in respect of the subject matter.
41. Furthermore, it is also not lost on this court that the dispute pertaining to ownership of the suit property is actually between the Applicant and the Interested party. However, it is admitted that the dispute pertaining to the said ownership is the subject of a civil suit, namely, Milimani CMELC No E400 of 2022, which is still pending hearing and determination.
42. Inevitably, the question as to who is the lawful and legitimate owner of the suit property is being determined and shall be determined by the Chief Magistrates Court and thereafter who ever shall be aggrieved by the said decision shall be at liberty to approach the Environment and Land Court for further redress.
43. Back to the subject dispute. I have pointed out that there is no ownership dispute between the Applicant and the Respondents, who are the Principal Parties in the subject matter.
44. Conversely, I have pointed out that the reason why the Applicant has filed the Petition before the Honourable court is because the 1st to 3rd Respondents, have been arresting the Applicant and thus violating the Applicant's fundamental freedoms, in respect of Articles 27, 29 and 47 of the Constitution, 2010.
45. Given the nature of the reliefs sought and the parties who are bound to be affected by the orders sought, if any, is granted, it is now incumbent upon this Honourable court to interrogate whether there is any iota and/or scintilla of claim that touches on and concern Article 162(2) (b) of the Constitution, 2010.
46. To my mind, the central and critical issue is that the Applicant seeks the intervention of this Honourable court to avert, restrain and/or otherwise prohibit what he calls arbitrary arrest, detention and prosecution, (sic) on the basis of charges touching on the acquisition of the suit property.
47. In my humble view, there is no aspect of the Petition and by extension the Application, where this Honourable court is being called upon to determine the question of ownership and title to the suit property. For good measure, the ownership and Issue of title to the suit property, has admittedly been left to the Chief Magistrate's court.



48. In the absence of a claim touching on and concerning ownership of and titled to and the rights to occupy the suit property, as envisioned vide Article 162(2) (b), I am afraid that the subject dispute does not fall within the Jurisdiction and mandate of the Environment and Land Court.
49. It is instructive to note that Jurisdiction is donated by the Constitution or Statute; or both. Consequently, it behooves each and every court to interrogate and discern whether same is seized of the requisite Jurisdiction before venturing to entertain any subject dispute.
50. For the avoidance of doubt, the position as pertains to the significance of Jurisdiction was underscored and propounded by the Supreme Court in the case of Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 Others (2012)eKLR, where the court stated and observed thus;
- (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 to itself jurisdiction exceeding that which is conferred upon it 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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.
51. Further and in addition, the question of Jurisdiction was also adverted to and considered in the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, where the Court of Appeal stated as hereunder;
1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
- In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.
52. Recently, the Court of Appeal returned to consider the implication of Jurisdiction and how same goes to the root of every dispute to be handled and addressed by the court. In this regard, it is imperative to take cognizance of the decision in the case of National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) (3 February 2023) (Judgment), where the court stated as hereunder;
15. The ELRC failed to appreciate that jurisdiction was determined on the basis of pleadings before consideration of the substantive merits of the case. The petitions challenged the constitutional validity of the legislative process leading to enactment of a legislation and or



some of its provisions. The instant matter was not an employer-employee dispute. The ELRC failed to appreciate that laws affected many things in a variety of ways, large and small, but those side winds did not determine what matter a law was in relation to. That was determined by analyzing the central focus of the law, what it was really all about. In order to analyze what matter a challenged law was “in relation to” the court had to separate it from matters incidentally affected by the law. The bench failed to appreciate that crucial separation.

16. From a reading of articles of 162(1), (2)(a) and (b) and (3) and 165 (3) (d)(i) of the Constitution and section 12 (1) (a)-(f) of the ELRC Act and the germane issue before the ELRC, the ELRC wrongfully assumed jurisdiction. Parties could not by consent confer jurisdiction on a court, which it did not have by virtue of its enabling statute. When it came to determining the issue of jurisdiction, a court could not be influenced by sympathy. Where the statute creating a court conferred it with jurisdiction over a limited subject matter, it could only entertain any such claim that fell within the purview of the subject matter.
53. Guided by the foregoing decisions, I beg to point out that in determining whether or not this court is seized of the requisite Jurisdiction, the court is called upon to ascertain and discern what are the nature of issues raised, the reliefs sought and the Parties against whom the reliefs have been sought.
54. Taking into account the foregoing, it is imperative to point out that the gravamen/ substratum of the suit before the Honourable court relates to whether the arrest, detention and proposed arraignment of the Applicant in court with various offenses, arising from the acquisition of the suit property fall within the Jurisdiction of this court.
55. Furthermore, it is also important to state and underscore that the primary reliefs which are sought in respect of the subject matter, have been sought against and can thus only issue against the Respondents and not otherwise.
56. In the circumstances, I must continue to ask myself whether the Applicant herein has any ownership dispute pertaining to any land, with/against the Respondents, who are the principal Parties who have been sued. Clearly and to my mind, the answer is in the negative.
57. Notwithstanding the foregoing, it is also appropriate to state and underscore that whereas land has been alluded to as the basis of the intended arbitrary arrest, but the inclusion of land in this particular matter is a side-wind and merely descriptive of the circumstances leading to arbitrary arrest, detention and prosecution.
58. Put differently, what I gathered from the totality from the allegations/averments contained at the foot of the Petition, is that the Interested Party is saying that the Applicant procured and obtained the certificate of title by fraud and thus same ought to be prosecuted.
59. Further and on the other hand, the Applicant is saying that the title to the suit property was not procured by fraud/false pretense and thus same ought not to be arrested and prosecuted. Invariably, the determination as to whether or not there was fraud or any criminal offense committed in the process of the acquisition of the suit property, is a matter that can only be determined by the criminal court, seized of the requisite Jurisdiction and not otherwise.
60. In my humble view, the gravamen/substratum of the Petition before the court has nothing to do with ownership to or title to land. For coherence, it has everything to do with whether the Applicant can be arrested and prosecuted for (sic) cognizable offenses, if any, committed out of the acquisition of the suit property.



61. Owing to the foregoing, I hold a strong position and view that the issues at the foot of this Petition, which turn on the right to protection against arbitrary arrest, human dignity and protection of fundamental rights, falls within the Jurisdiction of the High Court as espoused and entrenched in Articles 23(1) and 165(3) of the Constitution 2010.
62. Before departing from the issue of Jurisdiction, I beg to point out that even though the subject Petition was initially filed before the High Court, the transfer of same to the Environment and Land Court, with humility, does not appear to have been well grounded in law and in particular the provisions of Article 162 (2) (b) of the Constitution, 2010.
63. Notwithstanding the foregoing, the Applicant who had hitherto filed the Petition before the High Court ought to have been heard before (sic) the transfer of the Petition to the Environment and Land Court. Clearly, such a scenario would have enabled the Applicant to reconsider his position, as pertains to the court seized and possessed of the requisite Jurisdiction.
64. Further and in the alternative, the Applicant herein ought to have filed a suitable Application for review of the order transferring the Petition to the Environment and Land court. However, the applicant appears to have been contended with the transfer and hence same must now bear the consequence of the finding that this particular matter does not belong to or fall within the constitutional Jurisdiction of the Environment and Land court.
65. In any event, I have agonized on whether to re-transfer the suit/Petition back to the High Court, where it was first lodged, but I hold a strong view that the moment a suit, the Petition not excepted, is mounted before a court without Jurisdiction, such a suit cannot be transferred for whatever purposes.
66. In this respect, decisions abound. However, it suffices to cite and adopt the holding in the case of Kenya Ports Authority Ltd v Modern Holdings (EA) Ltd (2017)eKLR, where the Court of Appeal stated and held thus;

“Generally speaking and on the authority of the Supreme Court decision in Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, a court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See The Owners of the Motor Vessel Lilian ‘S’ v. Caltex Kenya Limited (1989) KLR 1.

This Court in Adero & Another V Ulinzi Sacco Society Limited [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;

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 2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.
 3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
 4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.



5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.
6.
7.” (Our emphasis).

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings 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 only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

(See *All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others*, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, *ex nihilo nihil fit* (out of nothing comes nothing).

67. Most importantly, the Supreme Court of Kenya, which is the apex court and whose decisions are binding on all the courts, (except herself) has also weighed on the question as to whether a suit filed in a court without jurisdiction can be transferred (sic) to the court deemed to be possessed of the requisite Jurisdiction.
68. However, the answer was precise and succinct that a case filed in a court without Jurisdiction is a nullity and thus incapable of being transferred.
69. For good measure, the case of *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR, is instructive and appropriate. For clarity, the court stated and held as hereunder;
 - (154) However, as it was well elucidated in the case of *Kagenyi v Musiramo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.
70. Premised on the succinct exposition of the law, in terms of the decisions cited in the preceding paragraph, I am in disinclined to transfer this Petition herein to the High court. In any event, the Applicant appears to have been contented with the matter being before the Environment and Land Court.
71. In a nutshell, I am constrained to and do hereby find and hold that the Environment and Land Court is not seized of the requisite Jurisdiction to entertain the dispute espoused at the foot of the Petition and by extension the Application for conservatory orders.
72. Consequently and in this regard, the Petition is a proper candidate for being struck out.



Issue Number 2. Whether The Applicant Herein Has Established And Demonstrated That His Rights And Fundamental Freedoms As Enshrined In the Constitution 2010 Have Been Breached, Violated And /or Infringed Upon.

73. Despite having found and held that this Honourable court is devoid and divested of the requisite Jurisdiction to adjudicate and entertain upon the issues raised at the foot of the Petition, I feel obliged and obligated to state that if the dispute beforehand relates to the manner in which the property was acquired, then the parties disputing over ownership, should approach the dispute in an appropriate manner to enable the question of ownership to be determined once and for all.
74. Notwithstanding the foregoing, it is also not lost on this Honourable court that there is no law that bars and/or prohibits the commencement of criminal investigations, arrest and (sic) prosecution of any person, the Applicant herein, not excepted, even though there exists a pending civil suit/proceedings.
75. To anchor and vindicate the foregoing observation, I adopt and endorse the holding of the Court in the case of Republic v Attorney General & 4 Others Ex-parte Kenneth Kariuki Githii (2014)eKLR, where the Court observed as hereunder;

“The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.”

76. Be that as it may, there is also need to emphasize that if at any point in time there arises a situation that raises a basis for approaching the High Court to avert and/or prohibit any criminal prosecution that is likely to breach, violate and or infringe upon the Fundamental rights, then any Applicant, the Applicant herein not excepted is at liberty to approach the appropriate court in line with the provisions of Articles 22 and 258 of the Constitution 2010.
77. However, having made the foregoing statements, I beg to point out that this court is not seized of the requisite Jurisdiction to grant and or issue the conservatory orders, which were sought at the foot of the Application dated the 9th February 2023 or otherwise.
78. Furthermore and as concerns whether the Interested Party can file an Application seeking for an order of injunction, (sic) to restrain the Applicant from using the suit property, it is important to point out



that an Interested Party cannot raise, canvass and or propagate any issue, which is at variance with issues raised and espoused by the Principal Parties.

79. For good measure, the position of the law as regards the pronouncement made in the preceding paragraph was well and aptly articulated by the Supreme Court of Kenya in the case of *Francis Kariuki Muruatetu & Others v Republic & 5 Others* (2016)eKLR, where the court stated as hereunder;

(41) Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.

80. To surmise, the Application dated the 13th March 2021; and in respect of which the Interested Party sought orders of Temporary Injunction, is certainly misconceived and misinformed.

Final Disposition

81. Having duly addressed and considered the two thematic issues, which were itemized and elaborated upon in the body of the subject Ruling, it is evident, apparent and crystal clear that entire Petition together with the Application thereunder, are certainly outside the purview of the Environment and Land Court, as established vide Article 162(2) (b) of the *Constitution* 2010.

82. Consequently and in the premises, the orders that commends itself to me is one for the striking out of the Petition as well as the Application for conservatory orders. Further, the Application by the Interested Party dated the March 13, 2023, is similarly struck out.

83. Given the peculiar circumstances attendant to and surrounding the instant Petition and coupled with the fact that same was hitherto filed before the court with the requisite Jurisdiction; Each Party shall bear own costs.

84. In addition and for good measure, the Conservatory Orders which were hitherto granted on the February 14, 2023, be and are hereby discharged and/or vacated.

85. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY, 2023.

OGUTTU MBOYA

JUDGE

In The Presence Of:

Benson – court assistant



Ms. Kerubo for the Petitioner/Applicant

Mr. Mac Ronald h/b for Mr. Gatheru Gathemia for the Interested Party

N/A for the Respondents.

