



**Nyaga & 19 others (Suing on behalf of the 150 Members of Kismayu Farmers Company) v  
Ngunyi (Deputy County Commissioner Langata Sub-County) & 4 others (Petition E86 of 2016)  
[2022] KEHC 13175 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13175 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**PETITION E86 OF 2016**  
**HI ONG'UDI, J**  
**SEPTEMBER 30, 2022**  
**IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF THE**  
**REPUBLIC OF KENYA, 2010**  
**AND**  
**IN THE MATTER OF RULES 11, 12 AND 13 OF THE CONSTITUTION**  
**OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF**  
**FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)**  
**HIGH COURT PRACTICE AND PROCEDURE RULE, 2006**  
**AND**  
**IN THE MATTER OF CONTRAVENTION AND OR ALLEGED**  
**CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS**  
**UNDER ARTICLES 1, 2, 20, 22(1)(A), 40, 42, 43, 47, 48 AND 53 OF**  
**THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF FORCEFUL AND UNLAWFUL EVICTION FROM**  
**LAND**  
**AND**  
**IN THE MATTER OF LR. NO. 209/10533**  
**BETWEEN**  
**ABISHAG NYAGA ..... 1<sup>ST</sup> PETITIONER**



JANE KALEKYE MUSEMBI .....	2 <sup>ND</sup> PETITIONER
FRIDA KAPERRE .....	3 <sup>RD</sup> PETITIONER
JAMES KAPERRE .....	4 <sup>TH</sup> PETITIONER
CAROLINE ACHIENG .....	5 <sup>TH</sup> PETITIONER
JOSPHINE KALEKYE WAMBUA .....	6 <sup>TH</sup> PETITIONER
JOHN MUINDE .....	7 <sup>TH</sup> PETITIONER
BEATRICE WANJIRU .....	8 <sup>TH</sup> PETITIONER
SAMWELI KYALO .....	9 <sup>TH</sup> PETITIONER
JULIUS NDONGA .....	10 <sup>TH</sup> PETITIONER
NEWTON IBELHA .....	11 <sup>TH</sup> PETITIONER
FESTUS GAKUO .....	12 <sup>TH</sup> PETITIONER
JOHN M. NJOROGE .....	13 <sup>TH</sup> PETITIONER
MARK M. JUSTO .....	14 <sup>TH</sup> PETITIONER
TITUS MUTUKU .....	15 <sup>TH</sup> PETITIONER
JOSEPH MAINA .....	16 <sup>TH</sup> PETITIONER
JOSEPH OKARU .....	17 <sup>TH</sup> PETITIONER
PAUL MUINDE .....	18 <sup>TH</sup> PETITIONER
IRENE NYAWIRA .....	19 <sup>TH</sup> PETITIONER
CECILIA WANJIRU .....	20 <sup>TH</sup> PETITIONER
<b>SUING ON BEHALF OF THE 150 MEMBERS OF KISMAYU FARMERS COMPANY</b>	

**AND**

MARTIN NGUNYI (DEPUTY COUNTY COMMISSIONER LANGATA SUB- COUNTY) .....	1 <sup>ST</sup> RESPONDENT
SARAH KINYANJUI (OCS WILSON AIRPORT POLICE STATION) .....	2 <sup>ND</sup> RESPONDENT
ATTORNEY GENERAL .....	3 <sup>RD</sup> RESPONDENT
NATIONAL LAND COMMISSION .....	4 <sup>TH</sup> RESPONDENT
KENYA AIRPORTS AUTHORITY .....	5 <sup>TH</sup> RESPONDENT



## JUDGMENT

1. Before this Court is an application for joinder of the proposed 5<sup>th</sup> respondent dated January 26, 2022. It was filed by the 4<sup>th</sup> respondent. There is also a preliminary objection dated January 31, 2022 filed by the Attorney General (3<sup>rd</sup> Respondent).
2. On June 14, 2022 this court gave directions that it would first hear the application. However after perusal of the pleadings and submissions filed I am of the view that both the application and preliminary objection should be dealt with in this Ruling which I hereby do.
3. The 4<sup>th</sup> respondent in the Notice of motion dated January 26, 2022 seeks the following orders:
  - i. That the Kenya Airports Authority be enjoined in the above petition dated March 4, 2016 and filed on March 4, 2016 as the 5<sup>th</sup> Respondent.
  - ii. That leave be granted to the 5<sup>th</sup> Respondent to file and serve a replying affidavit to the amended petition dated February 23, 2016 and filed on February 24, 2016 within 14 days.
4. The application is premised on the following grounds:
  - i. That the proposed 5<sup>th</sup> Respondent, Kenya Airports Authority (KAA), is a State Corporation established by the [Kenya Airports Authority Act](#) Cap 395.
  - ii. That under section 8(1) (b) of the Kenya Airports Authority Act, the 5<sup>th</sup> respondent is mandated to, among other functions administer, control and manage aerodromes and any other property.
  - iii. That section 13(1)(a) of the Kenya Airports Authority Act states that where land is required by the Authority for purposes of the Authority, it may either, if such land is not public land, acquire such land through negotiation and agreement with the registered owner thereof: Provided that notwithstanding the provisions of section 6 of the Land Control Act (Cap 302), the ensuing transaction shall not require the consent of a land control board if the land to be acquired is agricultural land.
  - iv. That Section 13(1) (b) of the Kenya Airports Authority provides if such land is public land or if the Authority is unable to acquire it by agreement in accordance with paragraph (a) notify the Minister responsible for public lands that the land specified in the notice is required for the purposes of the Authority.
  - v. That given the foregoing the 5<sup>th</sup> respondent is therefore relevant in these proceedings for the proper disposal of this matter.
5. One Brian Ikol the director legal affairs and enforcement of the 4<sup>th</sup> respondent filed a supporting affidavit sworn on January 26, 2022 in support of the application. Besides reiterating what is in the grounds cited above counsel contends that the current proceedings touch on land in contention between the petitioners and the proposed 5<sup>th</sup> respondent.
6. The petitioners through the 1<sup>st</sup> petitioner filed a replying affidavit sworn on March 29, 2022 and opposed the said application. He deponed that the application was improperly before the court as the applicant had no locus to file the same. Further that the proposed 5<sup>th</sup> respondent has no knowledge of the said application for joinder. He further depones that there is no dispute about the ownership of the land from which the petitioners were evicted. That there is evidence of the proposed 5<sup>th</sup> respondent



acknowledging their ownership of the suit land (see page 80 of the petitioners' documents dated March 17, 2021).

7. It is his averment that the outcome of the amended petition would not in any way prejudice the proposed 5<sup>th</sup> respondent. He also avers that a similar application dated April 11, 2016 seeking similar orders was made and was denied by Onguto J (late). He annexed a copy of the said application (AN-01). He did not however annex a copy of the dismissal order claiming that the original file had gone missing so it could not be traced.
8. He avers that the proposed 5<sup>th</sup> respondent having been a party to these proceedings at one point, should have acted to assert its position. That, failure to do so proves they have no claim whatsoever over this property. The deponent accuses the 4<sup>th</sup> respondent of deliberately delaying the prosecution of this petition.
9. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have not filed any responses to the application. On the other hand M/s Mwasao for the 3<sup>rd</sup> respondent informed the court that she had no objection to the application, for joinder.

### Submissions

10. The 4<sup>th</sup> respondent's submissions are dated April 7, 2022 and filed by John Andrew Kiilu advocates. Counsel while referring to some letters in the petitioners' bundle of documents submits that the 5<sup>th</sup> proposed respondent is at the heart of this suit. That the ownership of the land if determined in the absence of the proposed 5<sup>th</sup> respondent would be prejudicial to them.
11. He contends that the proposed 5<sup>th</sup> respondent has a personal stake in the matter in question. The same is identifiable as it has no mandate to deal with private land as was held in [\*Republic vs National Land Commission Ex Parte Cecilia Chepkoech Leting & 3 others \[2016\] eKLR\*](#) where the Court stated:

' As I have said above, the jurisdiction of the Commission is, as far as relevant to these proceedings, not defined by the process of acquisition of the land but the status of the land at the time of the investigation and at the effective date. Apart from the Constitution it has not been pointed out to me that there is another definition of public land that would bring private land as defined under the Constitution within the ambit of public land in order for the Commission to have jurisdiction to review its disposition in order to establish the propriety or legality thereof.'

12. The petitioners' submissions are dated June 13, 2022 and filed by John N Mugambi & Associates. Counsel refers to Order 1 Rules 1 & 3 of the [\*Civil Procedure Rules\*](#) and the definition of a 'Necessary party' in the *Black's Law Dictionary 8<sup>th</sup> Edition* to determine whether the proposed 5<sup>th</sup> respondent is a necessary party in these proceedings. Counsel further cited the case of [\*Kenya Meidcal Laboratory Technicians & Technologists Board & 6 others vs Attorney General & 4 others \[2017\] eKLR\*](#) where Mativo J (as he then was) stated:

' A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the Applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party



claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty.'

13. In [John Hurun Mwau v Simone Hayson & 2 others \[2021\] eKLR](#) where the Court held:

' In the case of Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR the Supreme Court of Kenya held that;

'[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held: '[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.'

Also see Meme v Republic [2004] 1 EA 124

14. Counsel argues that from the above provisions of the law and cited authorities there must be proof of certain things e.g legal interest, in the matter, their participation for issues to be sorted out with finality, any prejudice which would be caused if the applicant is not enjoined as a party. Finally the interest must be legal and identifiable.

15. It is his submission that nothing has been produced before the court to show that the proposed 5<sup>th</sup> respondent has an interest in the matter. There is no copy of title, allotment letter, official search certificate or any other document in support, of the 4<sup>th</sup> respondent's position. He urges that the 4<sup>th</sup> respondent is the one who issued the petitioners with the allotment letter.

16. He referred to a similar application having been unsuccessfully made by the proposed 5<sup>th</sup> respondent. He submits that the proposed 5<sup>th</sup> respondent is being imposed on them by the 4<sup>th</sup> respondent yet they have no interest in it.

17. On whether there is a valid cause of action against the proposed 5<sup>th</sup> respondent counsel relied on the case of [Susan Rokih v Joyce Kandie & 6 others \[2018\] eKLR](#) where the Court held:

' The principles which guide a court in the exercise of its discretion when considering an application under Order 2 rule 15 have been enunciated in several authorities. In DT Dobie & Co (K) Ltd V Muchina, [1982] KLR, the Court of Appeal when interpreting Order VI Rule 13 (1) of the repealed Civil Procedure Rules which is the equivalent of the current Order 2 Rule 15 defined the term 'reasonable cause of action to mean 'an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.' The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the defendant which gave the plaintiff a cause of complaint.'

18. Counsel stresses that the petitioners have no claim against the proposed 5<sup>th</sup> respondent.



## The preliminary objection

19. The 3<sup>rd</sup> respondent through learned counsel M/s Mwasao raised a preliminary objection dated January 31, 2022 to the amended petition dated October 15, 2019. The same is based on six (6) grounds namely:
- i. That Honourable Court lacks jurisdiction to hear and determine the petition herein since it is a dispute relating to the environment and the use and occupation of, and title to, land by virtue of the provisions of Article 165(5) of the Constitution which provides that 'the High Court shall not have jurisdiction in respect of matters – (b) falling within the jurisdiction of the courts contemplated in Article 162(2).
  - ii. That section 13 of the Environment and Land Court Act provides that the Environment and Land Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and shall have powers to hear and determine disputes relating to environmental planning and protection, land use planning, title, tenure, boundaries, rates, valuations, mining, minerals and other natural resources; disputes relating to public, private and community land and contracts, choses in action or instruments granting any enforceable interests in land and any other dispute relating to environment and land.
  - iii. That section 13 (7) of the Environment and Land Court Act provides that the Environment and Land Court can issue prerogative orders, which provision if read together with the provisions of Article 162(2) of the Constitution ousts the jurisdiction of this Court to hear and determine this case.
  - iv. That in the matter of *Joyce Mutindi Muthama & another v Josephat Kyololo Wambua & 2 others [2018] eKLR*, the Environment and Land Court held that:

'It is true, as submitted by the Respondents' counsel, that under Section 13(3) of the Environment and Land Court Act, the court has the mandate to hear and determine applications for redress of a denial, violation or infringement of, or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. However, the Act does not limit or preclude the court from hearing applications for redress of a denial or violation of any other right, if that right is in furtherance of a dispute relating to land and the environment.
  - v. That in the matter of *Mohammed Said v County Council of Nandi [2013] eKLR*, the Environment and Land Court while ruling on the preliminary objection held that:

'It is the same issue with the Environment and Land Court. The Court has jurisdiction to interpret the constitution and fundamental rights and freedoms over matters which fall under the subject matter of environment and land. I do not agree with counsel for the 2<sup>nd</sup> respondent that the Environment and Land Court can only hear petitions touching on Articles 42, 69 and 70 of the Constitution. The jurisdiction of the Court is not restricted only to hearing petitions falling under Articles 42, 69 and 70. It can hear any constitutional petition under any provision of the constitution so long as the matter relates to the environment and the use and occupation of, and title to, land.'
  - vi. That in the matter of *Omar Tabir Said v Registrar of Titles and another [2013] eKLR*. This petition arises out of the revocation of the petitioner's title to land described as LR No



MN/1/2411 by way of administrative fiat. The petitioner sought judicial reviews orders that the revocation carried out by the 1<sup>st</sup> respondent is unconstitutional, null and void abinitio. The High Court held that;

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

20. The 1<sup>st</sup> petitioner filed a replying affidavit sworn on March 29, 2022. A summary of his case is that the preliminary objection has been field to simply circumvent the process of justice. He avers that the 3<sup>rd</sup> respondent has been participating in these proceedings for six (6) years, and never raised this issue. He says their claim is based on the eviction from their land and not ownership of the same. He asks the court to consider the pleadings herein in determining the issue raised in the preliminary objection which should be dismissed.
21. The 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> respondents did not file any response and /or submissions to the preliminary objection dated January 31, 2022.

#### **Submissions:**

22. The respondent's submissions to the preliminary objection were filed by learned counsel M/s Betty Mwasao and are dated February 25, 2022. Counsel has set out the petitioner's and 3<sup>rd</sup> respondent's case. The 3<sup>rd</sup> respondent's case is based on the preliminary objection raised. Counsel argues that this court lacks jurisdiction to hear this case and so should down its tools. See [\*Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & 2 others\*](#) [2012] eKLR.
23. She submits that the petitioners are primarily claiming ownership rights of the subject property. It is alleged that the Kismayu Farmers were allotted the land vide a letter of allotment dated June 18, 1995 issued by the Commissioner of Lands. That the petitioners are thus praying to be compensated for their alleged forceful eviction from the subject property and compensation arising therefrom.
24. Referring to the Constitution of Kenya and the Environment & Land Court Act No 19 of 2011 she submits that it is the Environment and Land Court (ELC) which has jurisdiction to hear and determine land disputes such as this. She refers to Article 162(2) (b) of the Constitution, Section 4 and 13(2) (d) of the ELC Act to buttress this submissions.
25. She contends that by virtue of Article 162(2)(b) as read with section 13(7) of the ELC Act the Environment and Land Court has the power to issue prerogative orders. Thus this court's jurisdiction to hear this petition is ousted. She referred to the case of [\*Omar Tabir Said v Registrar of titles and another\*](#) [2013] eKLR where it was held:

' The E & L Court has juridical likeness or similarity with the High Court. In this juridical likeliness, the E and L Court would have authority to entertain applications for the redress of a denial, or violation, or threat to a right or fundamental freedom in the Bill of Rights in matters falling under its jurisdiction. That is why Section 13(2)(e) of The E and L Court Act gives the Court wide powers to hear and determine 'any other dispute relating to Environment and Land.' I take the view that the E and L Court has jurisdiction to enforce the Bill of Rights in disputes that touch on or are incidental to all matters specified in Article



162 (2) (b) of the Constitution and Section 13(2) of the E and L Act, it is not limited to only those expressly mentioned in Section 13(3).'

26. Counsel further referred to the case of *United States International University (USIU) vs Attorney General [2012] eKLR* on the issue of jurisdictional scope of the Constitutional and Human Rights Court where the Court held that:

' Labour & employment Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current industrial court.'

27. She submits that this court lacks the jurisdiction to hear and determine the amended petition. As the matter falls under the jurisdiction of the Environment and Land Court.
28. The petitioners' submissions by John N Mugambi & associates are dated March 29, 2021. Counsel relied heavily on Article 165(1)(3), Article 23(1) and the case of *Kenya Hotel Properties Limited v Attorney General & 5 others [2018] eKLR* for his submission that this court has the required jurisdiction to determine this petition. He contends that the petition seeks reliefs derived from violation of rights of the petitioners. Further that the facts in the amended petition have not been controverted and so there is a prima facie case of the violation of the rights complained of.
29. Counsel submits that contrary to averments by the 3<sup>rd</sup> respondent the petitioners are not fighting over property or ownership rights. There is no issue on the ownership of the property. That the petitioners claim stems from the illegal actions undertaken against them and their forceful eviction from their own property contrary to a valid court order. Thus the root of the claim is human rights violations and infringements which fall squarely under the jurisdiction of this court. The preliminary objection was therefore opposed.

### **Analysis and determination**

30. I have carefully considered the application for joinder by the 4<sup>th</sup> respondent and the preliminary objection by the 3<sup>rd</sup> respondent. I have equally considered the responses and submissions filed by the parties. I find the issues falling for determination to be:
- i. Whether the 4<sup>th</sup> respondent has made out a case for the proposed 5<sup>th</sup> respondent's enjoinder as a party.
  - ii. Whether this court has jurisdiction to hear and determine this petition.
- Issue No.(i) Whether the 4<sup>th</sup> respondent has made out a case for the proposed 5<sup>th</sup> respondent's enjoinder as a party.
31. The 4<sup>th</sup> respondent in filing the application dated January 26, 2022 relied on sections 8 & 13 of the Kenya Airports Authority Act (Cap 395 Laws of Kenya). The deponent Brian Ikol averred that



the current proceedings touch on the land in contention between the petitioners and the proposed 5<sup>th</sup> respondent. The petitioners have opposed the application saying they have no claim against the proposed 5<sup>th</sup> respondent.

32. Upon perusal of the pleadings herein it's clear that the violations complained of arose as a result of alleged evictions of the petitioners by a group of Administration Police, and other unknown individuals led by the 1<sup>st</sup> & 2<sup>nd</sup> respondents. A further perusal of the response by the 1<sup>st</sup> respondent dated April 8, 2016 shows two letters (KM-1) dated October 21, 2015 and February 2, 2016 respectively, which involve Kenya Airports Authority and Masaal General Agencies Ltd. The two letters make mention of a parcel of land with a title, which requires fencing.
33. In this file is a notice of motion dated April 11, 2016 filed by Kenya Airports Authority (KAA) as an interested party which requested to be enjoined. The reason for the requested enjoinder was that KAA is the legally registered owner of the suit Land Reference Number 209/10553 occupied by the petitioners. Counsel for the petitioners submitted that the said application was heard and disallowed but the original file got lost. That is not correct because the file before me is the original file. It contains a skeleton file which means it may have been misplaced at one point but not lost.
34. A perusal of the file shows that on April 11, 2016, counsel for KAA informed the Court of the application dated April 11, 2016 for enjoinder which counsel wanted heard. The court did not address Mr Ouko for KAA but elected to proceed with the chamber summons dated March 4, 2016 seeking conservatory orders. The Ruling was delivered on April 29, 2016. There is nothing on the record showing the fate of the application for enjoinder dated April 11, 2016.
35. In the said application the deponent Katherine N Kisila averred in the affidavit dated April 11, 2016 as follows:
  1. That the petitioners have unlawfully encroached some of the sections within Land Reference Number 209/10553.
  2. That the petitioners have settled in these sections and are carrying out farming activities which have raised major safety and security concerns.
  3. That this court issued an order restraining eviction of the petitioners from the sections they occupy within Land Reference Number 209/10553 pending the hearing and determination of the petition (Annexed is a copy of the order marked KN1)
  4. That the interested party is the registered owner of the suit land and therefore has every right to evict the petitioners.
  5. That this purported eviction is lawful and extremely in the interests of maintaining safety and security around airport land.
  6. That it is only fair and just that the proposed respondents are joined to these proceedings to shed light on the reasons that necessitated the eviction of the petitioners.
36. There is no response by the petitioners to the application dated April 11, 2016. In the present application, the 1<sup>st</sup> petitioner refers to a letter dated June 28, 2016 stating that the Kenya Civil Aviation Authority (KCAA) acknowledged their ownership of the land No LR 209/10553.
37. Inasmuch as KCAA acknowledges the petitioners ownership of the land, KAA claims to be the owner and has title to it. Ownership if established is an identifiable and legal interest. This would therefore call for the enjoinder of a party in existing proceedings. The other interested party whom the 1<sup>st</sup> and



2<sup>nd</sup> respondents were offering security to is Masaal General Agencies Limited which is not a party to these proceedings.

38. Relying on Rule 5 of the 'Mutunga Rules' and the case of *Pizza Harvest Ltd v Felix Midigo* [2013] eKLR I find the main element for one to prove in consideration of injunction is an identifiable interest. In this case I find that Kenya Airports Authority and Masaal General Agencies Ltd ought to be enjoined as interested parties. Their injunction will shade some light as to who is the legal owner of parcel No LR 209/10553, and why the alleged evictions were carried out. Further any decision made in the matter will be binding on them in order to bring the matter to an end. See Pizza case.

Issue No ii. Whether this court has jurisdiction to hear and determine this petition.

39. From the above finding it is clear that the issue of ownership of the parcel of land No LR 209/10553 is not clear as the petitioners would like this Court to believe. What is it that led to the alleged evictions? Whichever party that initiated the eviction was obviously claiming that the petitioners had encroached on its land. It therefore means that before the court can delve into the issue of evictions and violation of constitutional rights, the issue of title/ownership must be established. It is at the core of this matter.

40. Jurisdiction is everything when it comes to the hearing and determining of cases. It flows from either the constitution or statute or both.

See the cases of (i) *Samuel Kamau Macharia and another vs Kenya Commercial Bank & 2 others* [2012] eKLR

ii. *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* [1989] KLR 1

iii. *In the matter of interim Independent Electoral Commission* [2011] eKLR *Constitutional Application No 2 of 2011*.

41. The jurisdiction to determine disputes related to land and the environment is on the Environment & Land Court (ELC) by virtue of Section 13 of the ELC Act as read with Article 162(2)(b) of the Constitution. Though the petitioners have presented this petition as a constitutional one, its substratum is a land dispute. The alleged evictions and constitutional violations are premised on the said land dispute.

42. As was held in the case of United States International University (USIU) (supra) the ELC has the jurisdiction to deal with any constitutional violations resulting from a land dispute. This is provided for under section 13 (3) of the ELC Act.

Also see (i) Mohammed Said vs County Council of Nandi [2013] eKLR

(ii) Omar Tahir Said v Registrar of titles and another [2013] eKLR.

43. The above being the position I find that the preliminary objection by the 3<sup>rd</sup> respondent dated January 31, 2022 raises a pure point of law, based on jurisdiction. See *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd* [1968] EA 696. This Court lacks the jurisdiction to hear and determine, this petition.

44. This is a matter that has been pending before this court since 2016. The issue of jurisdiction ought to have been dealt with long before now. I will therefore not strike out the Amended Petition as that would be an injustice to the Petitioners who believed all along that they were before the right court.

45. The upshot is that both the application dated January 26, 2022 and the Preliminary Objection dated January 31, 2022 have merit and are allowed. I therefore order that:



- i. The Kenya Airways Authority (KAA) and Masaal General Agencies Ltd be and are hereby enjoined as respondents.
- ii. The petition to be further amended within 5 days to include the names of the new respondents, who should be served with the petition.
- iii. The new respondents to file and serve a response to the amended petition within 14 days.
- iv. This matter is hereby transferred to the Environment and Land Court for hearing and determination. The same will be mentioned before the Presiding Judge ELC Nairobi on October 17, 2022 for further directions.
- v. Costs to be in the cause.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022 AT NAIROBI.**

**H. I. Ong'udi**

**Judge of the High Court**

