



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 92 OF 2019 (AS CONSOLIDATED WITH NO. 179 OF 2019)

**IN THE MATTER OF: ARTICLES 2 (1&2), 3(1), 10, 19, 20, 21, 22, 23, 27,
35, 40, 47, 48, 50(1), 67, 165(3) (b), 258(1) & (2) (C) OF THE CONSTITUTION
OF KENYA 2010;**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION AND THREATS TO
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 1(1), 2(1,2 and 3),
3(1), 4(2), 10, 27, 29, 40, 47, 73, 249(1&2), 250, 251 and 259(1) OF THE CONSTITUTION
OF KENYA 2010;**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 64 &
67 OF THE CONSTITUTION OF KENYA 2010;**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTIONS 5, 6, 7, 8,
9, 10 AND 14 OF THE NATIONAL LAND COMMISSION ACT, 2012**

AND

**IN THE MATTER OF: CONSTITUTIONAL AND STATUTORY VALIDITY
AND ROLES, POWERS AND AUTHORITY OF THE VICE CHAIRPERSON
OF THE NATIONAL LAND COMMISSION;**

AND

**IN THE MATTER OF: CONSTITUTIONAL AND STATUTORY VALIDITY
OF THE GAZETTE NOTICE NOS. 1551 DATED 15TH FEBRUARY, 2019
PURPORTING TO AMEND GAZETTE NOTICE NO. 11710 DATED 9TH
NOVEMBER, 2018 AT PAGE 3980 UNDER TABLE 1;**

IN THE MATTER OF: ILLEGAL CAPTURE AND THE ABUSE OF

CONSTITUTIONAL AUTHORITY AND ABDICATION OF DUTY BY STATE OFFICERS

BETWEEN

SOWESAVA SELF HELP GROUP

Suing through its officials Patrobas Awino

Alexander Hoops.....PETITIONER

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

PROF. MUHAMMAD ABDALLA SWAZURI.....2ND RESPONDENT

ABIGAL MBAGAYA.....3RD RESPONDENT

AND

GIDJOY INVESTMENTS LIMITED.....1ST INTERSTED PARTY

NAIROBI CITY COUNTY.....2ND INTERSTED PARTY

THE HON. ATTORNEY GENERAL.....3RD INTERESTED PARTY

SAVANNA JUA-KALI ASSOCIATION.....4TH INTERESTED PARTY

RULING

THE PETITION

1. The Petitioner through a Petition dated *11th March, 2019*, seeks the following orders :-

a) A declaration that the action of the 3rd Respondent to publish Gazette Notice No. 1550 dated the 15th February, 20129, in relation to L.R. No. Nairobi Block 82 without according the petitioners the right to be heard is unconstitutional and is therefore null and void;

b) A declaration that the unlawful invasion of the Petitioner's property, namely, Nairobi Block 82/7333 and subsequent destruction of the properties therein is a violation of the petitioner's right to property and the freedom and security to the person;

c) A declaration that the 3rd Respondent usurped the roles of the 2nd Respondent by publishing the Gazette Notice No. 1550 in relation to L.R. No. Nairobi Block 82 without any authority of the 2nd Respondent and the said Gazette Notice is therefore null and void;

d) A declaration that the 3rd respondent usurped the roles of the 2nd Respondent by publishing the Gazette Notice No. 1550 dated the 15th February, 2019 in relation to L.R. No. Nairobi Block 82;

e) A declaration that the Gazette Notice no. 1550 dated the 15th February, 2019 published by the 3rd Respondent in relation to L.R. No. Nairobi Block 82 is unconstitutional in so far as it purports to restrict the extent of enjoyment of the Petitioner's right to property as enshrined under article 40 of the Constitution of Kenya, 2010;

f) A declaration that any action taken by the 1st, 2nd, and 3rd Respondents in relation to the alteration of its earlier decision as per Gazette Notice No. 11714 dated the 9th November, 2019 in relation to L.R. No. Nairobi Block 82 or the implementation of any such promise without due process is a violation of the Petitioner's right to fair administrative process/action as enshrined under Article 47 of the Constitution of Kenya, 2010 and is therefore null and void;

g) A declaration that the deletion of the Gazette notice no. 11710 dated 9th November, 2018 at page 3980 under TABLE 1- Nairobi and the consequent insertion by Gazette notice no. 1551dated 15th February, 2019 without due process is in breach of the Petitioner's right to fair administrative action and therefore null and void;

h) A conservatory order restraining any person claiming interest other than through the petitioner of any portion of the Petitioner's land, whether by themselves, by agent(s), servants, or by any other description from unlawfully entering into or in any manner occupying any portion of the Petitioner's land, parcel Nairobi Block 82/7333/2;

i) *A conservatory order restraining the Respondent from amending, deleting or in any manner interfering with the Gazette Notice No. 11710 dated the 9th November, 2018 without according the petitioner a right to be heard;*

j) *A judicial Review Order of CERTIORARI to quash the Gazette Notice no. 1550 in relation to land parcel LR. No. Nairobi Block 82;*

k) *Such other and/or further relief as this court may deem fit to grant;*

l) *An order of costs be provided for.*

THE PRELIMINARY OBJECTION

2. The 1st Respondent on the 12th of June, 2019, raised a preliminary objection seeking to have the petition struck out on the following grounds;

a) *By deed of Articles 162 and 165 (5) of the constitution of Kenya, 2010 and Section 13 of the Environmental and Land Court Act, this Honourable Court has lacked jurisdiction to entertain, hear and determine the instant suit;*

b) *The instant Petition is an abuse of the Court Process since the substrum of this Petition is subjudice in;*

1. *NRB ELC Civil Suit No. 321 of 2018*

2. *NRB ELC JR No. 20 of 2018*

c) *The Petition be dismissed with costs since there is nothing to transfer to another court;*

THE RESPONSES TO THE PRELIMINARY OBJECTION

1ST RESPONDENT'S SUBMISSIONS

3. Through the submissions dated 14th October, 2019, the 1st Respondent in support of the preliminary objection stated, that the entire Petition objectively sought a claim of ownership of land under whose jurisdiction did not lie with the Constitutional Court but the Environment and Land Court, notwithstanding existence of a suit in the Environment and Land Court in ELC No. 301 of 2018.

4. The 1st Respondent argued further, that the Gazette Notice Number 1171 of 9th November, 2018 and gazette notice number 1551 of 15th, February, 2019, being challenged herein is pending determination before Hon. Justice Kosy Bor, in ELC Judicial Review No. 20 of 2018. It is further averred that the Petitioners actions amounts to gross abuse of the court process. The 1st Respondent relies on the case of **Republic v National Land Commission & Another**, where the Court observed that the matter filed in this court were supposed to have been filed in the specialized Court, namely Environment and Land Court and the Labour Relations Court.

5. In support of the proposition the 1st Respondent cited, **Article 162(2)(b) of the Constitution** which mandated the parliament to enact the **Environment and Land Court Act** to establish and operationalize the Environment and Land Court, as a specialized Court of similar status as the High Court. It is urged further that **Section 13 of the Environment and Land Court** vests the Environment and Land Court with jurisdiction to hear and determine disputes relating to title to land.

6. In support of the assertion the 5th Respondent placed reliance on the cases of **Republic vs. Karisa Chengo & 2 others** and **Mutanga Tea & Coffee Company Ltd vs Shikara limited & another** to support their assertions.

THE 2ND RESPONDENT'S SUBMISSIONS

7. The 2nd Respondent averred that the case herein, is not about whether Gazette Notice No. 1551 dated 15th, February, 2019, confirmed proprietary rights to either the petitioners or the interested parties, rather, the petition is about whether it was appropriate for the 3rd respondent to seize the 2nd respondent's powers and purport to issue a notice on behalf of the 1st respondent as if his seat was vacant.

8. The 2nd Respondent relied on the cases of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another (2012) e KLR**, and **Mwangi Stephen Muriithi v National Land Commission & 3 others [2018] e KLR**, to support their assertions.

9. It is therefore contended that this Honourable Court has jurisdiction to hear and determine the dispute herein.

THE 1ST INTERESTED PARTY'S SUBMISSIONS

10. The 1st Interested Party asserted that this matter ought to be heard by the Environment and Land Court by virtue of **Article 162(2)(b) of the Constitution**, being a Court with equal status as that of the High Court.

11. The 1st interested party also averred that there are other matters pending before the Environment and Land Court over the same suit property including; **ELC Judicial Review No. 20 of 2018 Gidjoy Investments Ltd vs. The National Land Commission & 5 others, ELC Civil Suit No. 301 of 2018 Gidjoy Investments Limited vs Zero Point Construction Company Ltd & 69 others** thereby making the suit herein res subjudice.

12. It is contended that the conservatory orders issued by the Court violates **Section 6 of the Civil Procedure Act** which bars the Court from hearing a matter substantially in issue in a previous suit between the same parties and before another Court.

13. The 1st Interested Party placed reliance on several case laws to support its assertion among them being **Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 others** and **Republic vs Chief Land Registrar**.

THE 2ND INTERESTED PARTY'S SUBMISSIONS

14. The 2nd Interested Party through its submissions dated 15th November, 2019, submitted that its claim, and the petitioner's claim in this petition is, that their right to fair administrative action was violated by the 3rd Respondent, when she purported to prepare subsequent gazette Notice no. 1551 dated 15th February, 2019 in the form of a corrigendum purporting to cancel and revoke Gazette No. 11714 without giving them a hearing contrary to **Article 50 of the Constitution**.

15. It is contended that the reliefs sought in ELC Judicial Review No. 20 of 2018 and ELC Civil suit No. 301 of 2018 are substantially distinct from the reliefs sought in this petition and therefore the res subjudice rule does not apply.

16. It is further submitted that **Article 162 and 165(5) of the Constitution**, and **Section 13 of the Environment and Land Court Act** is not applicable in so far as the cause of action is constitutional in nature.

3RD INTERESTED PARTY SUBMISSIONS

17. The 3rd Interested Party's position is that the issue surrounding the Gazette notices and the legality of decision making within the 1st respondent's organization arose secondary to the main substance of proceedings between the parties being the illegality of the petitioner's claim to the suit property, the issue herein therefore fell within the jurisdiction of the Environment and Land Court.

18. It is further submitted that the issues raised in this petition should have been heard by the Environment and Land Court in **ELC Judicial Review No. 20 of 2018 Gidjoy Investments Ltd vs. The National Land Commission & 5 others , ELC Civil Suit No. 301 of 2018 Gidjoy Investments Limited vs Zero Point construction company ltd & 69 others**.

19. The 3rd Respondent relied on **Article 162 (2) (b) of the Constitution**, that establishes the Environment and Land Court, which is vested with powers to hear and determine disputes relating to environment and use of land.

20. It is therefore submitted that the High Court is prohibited from hearing and determine matters falling within the purview of the Environment and Land Court's jurisdiction and sought that this Honourable Court to pronounce itself on the issue of jurisdiction.

4TH INTERESTED PARTY'S SUBMISSIONS

21. The 4th Interested Party submitted that the petitioner approached this Honourable Court because their rights had been violated, as outlined under **Article 40** - on the right to property, **Article 47 right to access to justice and fair hearing** as a sore enshrined under **Article 48, 50 and 67 on the functions of the National Land Commission**.

22. It is contended that **Article 165(2)(d) of the Constitution** vests the High Court with the mandate of hearing any question relating to the interpretation of the Constitution including; the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the constitution.

23. It is urged further with respect, to the issue of subjudice, that there are no suits relating to, the violation of the constitutional rights of the Petitioners, and the 4th Interested Party.

THE PETITIONER'S SUBMISSIONS

24. In response to the Preliminary objection, the petitioner through its submissions dated 14th, February, 2020 urged that the Petitioner is neither aware nor a participant, in NRB ELC Civil Suit No.321 of 2018 and such a suit has not been presented before the Court and before the parties to ascertain the alleged position. The Petitioner submits further, that NRB ELC JR NO. 20 of 2018 was dismissed for being an abuse of the court process and is not before any Court.

25. The Petitioner proceeded further to contend, that no pleading including those in ELC 301 of 2018 have been presented to show that this matter is sub judice. The Petitioner placed reliance on **Section 6 of the Civil Procedure Act** and the decision in the case of **Francis Ndahebwa Twala V Ben Nganyi [2018] e KLR** to support its assertion.

26. The Petitioner further stated that ELC suit No. 301 of 2018, deals with ownership dispute and, that its cause of action in the instant Petition is violation, infringement and threatened violation of constitutional rights and that land disputes are not the substance of the Petition.

BACKGROUND OF THE PETITION

27. The Petitioner was incorporated as a self-help group under the Ministry of Gender, Children and Social Development, on the 9th April, 1997 with its main objectives being to lobby for the settlement of its membership who are squatters.

28. The Petitioner aver that prior to the Registration of the Petitioner, its members had been living in Nairobi Block 82/7333 as squatters from 1970's and are still in occupation of the said land to date.

29. The Petitioner aver that they lobbied the Nairobi County Government to be allotted the land for settlement and were as a result allotted all that parcel of land known as Nairobi Block 82/7333.

30. It is Petitioner's contention that sometime in April, 2016 the Petitioner complained to the County Government of Nairobi to help ward off intruders and with a request to look into the issues surrounding Nairobi Block 82/7333, which allegedly belonged to the Petitioner as the lessor of the County Government of Nairobi with a view to obtain the title documents and to determine the official position of the parcel of land.

31. The Petitioner stated that sometime in 2016, the NLC appointed a team and conducted a public hearing to determine issues related to the ownership of the parcel of land and establish the status of the land parcel together with neighboring Nairobi Block No. 82/7375 and establish ownerships and make appropriate recommendations.

32. The Petitioner averred the National Land Commission made a determination which was followed by a Gazette Notice No. 11710 and dated 9th, November, 2018, with recommendations, that the Chief Land Registrar do issue title to Nairobi County Government and the county to plan L.R. No. Nairobi Block 82 as per the National Land Commission's determination.

33. The Petitioner stated, that Commissioners of the NLC including the chairpersons terms ended on the 19th, February, 2019, as they had exhausted their term. However three days before that on the 15th of February, 2019, the 3rd Respondent without any authority and without any meeting convened by the 2nd Respondent, unilaterally, callously, and maliciously purporting to act on behalf of the NLC, purportedly deleted and amended entry no. 11710 of the Gazette notice dated 9th November, 2018 vide Gazette notice no. 1551.

34. The Petitioner contended that the National Land Commission reversed its earlier decision as per Gazette Notice of 9th November, 2018 without notifying the Petitioner of any appeal and/or complaint raised by any persons/parties and without seeking the Petitioner's view on the proposed actions.

35. It is therefore stated the main issue in dispute is the said Gazette Notice no. 1551 dated the 15th February, 2019 as published by the 3rd Respondent. It is urged that the same was irregular, illegal and made in abdication of her duties as a state officer, in usurpation of the roles of the 1st and 2nd Respondents and therefore illegal null and void.

ANALYSIS AND DETERMINATION

36. Having carefully considered the Petition dated **11th March, 2019**, the 1st Respondent's Preliminary Objection dated **12th, of June, 2019** and the Petitioner's, Respondents and Interested Parties responses and submissions, I find that there arises only one single issue for determination thus:-

i. Whether this Honourable Court has jurisdiction to hear and determine the dispute herein;

i. WHETHER THIS HONOURABLE COURT HAS JURISDICTION TO HEAR AND DETERMINE THE DISPUTE HEREIN.

37. The 1st Respondent on the **12th of June, 2019**, raised a preliminary objection seeking to have the Petition herein, struck out, on the grounds among others, that by dint of **Articles 162 and 165 (5) of the Constitution of Kenya, 2010** and **Section 13 of the Environmental and Land Court Act**, this Honourable Court lacks jurisdiction to entertain, hear and determine the instant suit.

38. The Petitioner through its Petition dated **11th March, 2019**, seeks the following main prayers among others :-

a) A declaration that the action of the 3rd Respondent to publish Gazette Notice No. 1550 dated the 15th February, 2019, in relation to L.R. No. Nairobi Block 82 without according the petitioners the right to be heard is unconstitutional and is therefore null and void;

b) A declaration that the unlawful invasion of the Petitioners' property, namely, Nairobi Block 82/7333 and subsequent destruction of the properties therein is a violation of the petitioners' right to property and the freedom and security to the person;

c) A declaration that the 3rd Respondent usurped the roles of the 2nd Respondent by publishing the Gazette Notice No. 1550 in relation to L.R. NO. Nairobi Block 82 without any authority of the 2nd Respondent and the said Gazette Notice is therefore null and void;

d) A declaration that the 3rd respondent usurped the roles of the 2nd Respondent by publishing the Gazette Notice No. 1550 dated the 15th February, 2019 in relation to L.R. No. Nairobi Block 82;

e) A declaration that the Gazette notice no. 1550 dated the 15th February, 2019 published by the 3rd Respondent in relation to L.R. No. Nairobi Block 82 is unconstitutional in so far as it purports to restrict the extent of enjoyment of the Petitioner's right to property as enshrined under article 40 of the constitution of Kenya, 2010;

f) A declaration that any action taken by the 1st, 2nd, and 3rd Respondents in relation to the alteration of its earlier decision as per Gazette Notice No. 11714 dated the 9th November, 2019 in relation to L.R. No. Nairobi Block 82 or the implementation of any such promise without due process is a violation of the Petitioner's right to fair administrative process/action as enshrined under Article 47 of the Constitution of Kenya, 2010 and is therefore null and void;

39. It is noted, that from the above prayers the Petitioner, in its prayers sought reliefs relate to **Land Parcel No. L.R. No. Nairobi Block 82 and Nairobi Block 82/7333**. This in my view means that the Petitioner's main underlying dispute relates to land issue.

40. The question of jurisdiction has time and again been determined in several case. In the case of **Seven Seas Technologies Limited v Eric Chege [2014] eKLR**, where the court reiterated the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.

Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

41. Considering the aforementioned case law it is clear that jurisdiction is everything and without it, this court will not have the power to make a single step. It has to down its tools once and for all.

42. The Petitioner in its Petition has averred that sometime in April, 2016 it complained to the County Government of Nairobi to help ward off intruders and with a request to look into the issues surrounding **Nairobi Block 82/7333**, which allegedly belonged to the Petitioner, as the lessor of the County Government of Nairobi, with a view to obtain the title documents and to determine the official position of the parcel of land.

43. The Petitioner then proceeded to state that sometime in 2016, the NLC appointed a team and conducted a public hearing to determine issues related to the ownership of the parcel of land, establish the status of the land parcel together with neighboring **Nairobi Block No. 82/7375**, establish ownerships and make appropriate recommendations.

44. It is contended by the Petitioner that the National Land Commission made a determination which was followed by a **Gazette Notice No. 11714** dated **9th November, 2018** with recommendations, that the Chief Land Registrar do issue title to Nairobi County Government and the county to plan **L.R. No. Nairobi Block 82** as per the National Land Commission's determination.

45. It is Petitioner's position that Commissioners of the NLC including the Chairpersons terms ended on the **19th February, 2019** as they had exhausted their term. However three days before that on the **15th, of February, 2019**, the 3rd Respondent without any authority and without any meeting convened by the 2nd Respondent unilaterally, callously, and maliciously, purporting to act on behalf of the NLC, purportedly deleted and amended entry **no. 11710** of the Gazette notice dated **9th November, 2018** vide Gazette notice **no. 1551** necessitating the filing of the present Petition herein.

46. I have carefully considered the pleadings herein and looking keenly at the two Gazette Notices (**No. 11710 and no. 1551**). It is clear that the same touch on Land Parcel **LR No. Nairobi Block 82** and the issue raised herein have elements of land ownership, use, management and planning, which cannot be taken lightly and not an issue related to land.

47. **Article 165 (3) of the Constitution** confers the High Court with jurisdiction and provides thus:-

"165. High Court

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

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i) the question whether any law is inconsistent with or in contravention of this Constitution;

ii) *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

iii) *any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

iv) *a question relating to conflict of laws under Article 191; and*

e) *any other jurisdiction, original or appellate, conferred on it by legislation”*

48. **Article 165(3) of the Constitution** is clear that the High Court has jurisdiction to determine question as to whether a right or fundamental freedoms have been denied, violated or infringed. However it is instructive to note that the jurisdiction provided under **Article 165(3) of the Constitution** is subject to **Article 165(5) of the Constitution** which clearly provides as follows:-

“165. High Court

(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).”

49. It is therefore clear upon consideration of the aforesaid Articles, that pursuant to **Article 162(2) of the Constitution** the Parliament proceeded to enact the **Environment and Land Court Act 2011** which clearly at **Section 13** confers the Environment and Land Court with jurisdiction as follows under **Section 13(2) of the Act**.

“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 environment, 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, chooses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.”

50. Further, **Section 13(3) of the Act** proceeds to state;

“Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”

51. Taking a digestive look at the instant petition herein, it is clear that what the Petitioner is mainly seeking is largely centered on Land, namely **Gazette Notices No. 1551 and 11714** on land ownership, use, management and planning of **L.R. No. Nairobi Block 82** and **Nairobi Block 82/7333**.

52. The **Supreme Court** dealing with similar issue in the case of **Republic v. Karisa Chengo & 2 others, Petition No. 5 of 2015** it stated that:-

“...we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdiction of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with suis generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdiction. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.” (Emphasis added)

53. Similarly, the Environment Court in **ELC Case Number 63 of 2017 Christopher Ngusu Mulwa & 28 others V. The County Government of Kitui & Another** held as follows:-

“Consequently, and considering that a dispute relating to land and or the environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that has jurisdiction to entertain such matters. The two Courts cannot have concurrent jurisdiction in such matters because they are too distinct Courts”.

54. Further the Court of Appeal in the case of **Prof. Daniel N. Mugendi Vs. Kenyatta University & 3 others, Civil Appeal No. 6 of 2012**, stated as follows:-

“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matter, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.” (Emphasis added)

55. Upon consideration of **Article 165 of the Constitution** and in view of the above-cited Court decisions, and relevant statutes, I find that a dispute related to land may well be commenced by way of a Constitutional Petition; laying down even claims of Constitutional violations or breach. In such suit it may be dealing with a dispute in which the Petitioner may also be seeking Constitutional reliefs for alleged breach or violation, of constitutional rights among other reliefs related to land and that in itself cannot divest the Environment and Land Court of jurisdiction nor can such prayers or reliefs sought grant High Court jurisdiction, which the Constitution and Statute do not grant. The matters in which there are reliefs related to land remains matters for Environment and Land Court in spite of constitutional reliefs in the Petition, which while dealing with disputes relating to environment and land, the Environment and Land Court can deal with claims of breaches of fundamental rights associated with the land related issues.

56. I find in the instant Petition, it is clear that the Petitioner seeks to enforce constitutional violations with respect to land **L.R. No. Nairobi Block 82 and Nairobi Block 82/7333**. I find that the said constitutional violations averred by the Petitioners in this Petition can sufficiently be addressed by the Environment and Land Court, which is a Court of equal status to that of the High Court and is mandated to hear and determine any constitutional violations of fundamental rights associated with the land and environment related issues.

57. It is therefore my considered view that this Honourable Court is not divested with the jurisdiction to hear and determine the instant petition herein, rather, the same should be heard and determined by the Environment and Land Court.

58. There are several issues raised on the principle of subjudice, which have been raised by the 1st Respondent but it will not be necessary to determine the same since, the key and main issue of jurisdiction has already been determined and regardless of whether there are pending or determined suits in other Courts, I have opined that the proper Court to hear and determine the dispute herein would be the Environment and Land Court.

59. It is my view that other suits as mentioned in these pleadings, which are **ELC Case No. 301 of 2018, ELC Judicial Review No. 20 of 2018** and **ELC Case No. 578 of 2015**, and which have the same parties over the same subject matter, ought to be heard and determined by the said courts without unnecessary interference by this Court.

60. The upshot is that the Preliminary objection raised by the 1st Respondent dated 12th June, 2019 is merited. I however in view of my findings decline to strike out the Petition herein but instead transfer the present Petition to Environment and Land Court, Milimani Law Courts, to be heard together with any other related pending Petitions and more specifically ELC No. 301 of 2018 and JR No. 20 of 2018. Costs be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY, 2021.

.....

J. A. MAKAU

JUDGE