



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**PETITION NO E009 OF 2021**

SPACELER CO. LIMITED.....1<sup>ST</sup> PETITIONER

BRIAN KIPROTICH.....2<sup>ND</sup> PETITIONER

FELIX NGETICH.....3<sup>RD</sup> PETITIONER

KIPCHUMBA TARUS.....4<sup>TH</sup> PETITIONER

**VERSUS**

MR. (C.I) SIMEON LEMPASSY OLADA (NO. 233842)

(OCS, MOIBEN).....1<sup>ST</sup> RESPONDENT

MR. (I.P) ARNOLD CHIRO (NO. 236705)

(DEPUTY OCS, MOIBEN).....2<sup>ND</sup> RESPONDENT

MR. BENJAMIN KIMELI CHESIRE

(AREA CHIEF).....3<sup>RD</sup> RESPONDENT

THE INSPECTOR GENERAL OF POLICE (IG).....4<sup>TH</sup> RESPONDENT

MARYJUSTER CHEPLETING.....5<sup>TH</sup> RESPONDENT

AGRICULTURE FINANCE COOPERATION

(AFC).....6<sup>TH</sup> RESPONDENT

DIRECTOR OF PUBLIC

PROSECUTION (DPP).....7<sup>TH</sup> RESPONDENT

ELDORET CHIEF MAGISTRATE'S

COURT (CM).....8<sup>TH</sup> RESPONDENT

**RULING**

What is pending before the court is the preliminary objection dated 31<sup>st</sup> May 2021 filed by the 5<sup>th</sup> respondent. The preliminary objection is raised on the following grounds;

*a) THAT this Honourable court lacks the requisite jurisdiction to hear and determine this matter in light of the dictate of the law at Article 162(2) of the Constitution of Kenya, 2010 and Sections 13(1) and (2) of the Environment and Land Court Act No. 19 of 2011.*

**b) THAT this Honourable Court, to wit the ‘High Court’ is not clothed with the jurisdiction to hear and determine disputes relating to the Environment, use and occupation and of title to land.**

**c) THAT the petition herein touches on the use, trespass, occupation of the Parcel of land namely LR NO. 3209/1 measuring 305 Acres situated in Moiben Sub County Tabarbuch Area Uasin Gishu County.**

**d) THAT the 1st Petitioner and the Deponent of the petition and/or Affidavits in support of the petition have no locus standi to file this suit/petition in respect of the suit parcel of land namely LR NO. 3209/1**

**e) THAT the 1st petitioner is purporting to be registered owner of that Parcel of land known as LR 10275 whereas the suit parcel in the entire petition is in reference to LR 3209/1 situated at Moiben Area measuring 305 Acres.**

**f) THAT the director of the 1st Petitioner as per the Crl2 obtained from the Registrar of companies is one EMILY CHEROTICH EGO, however, a stranger EVANS KEMBOI KOECH has deponed the Affidavits in Support of the petition contrary to the Companies Act, 2015.**

## **APPLICANT’S CASE**

The 5<sup>th</sup> petitioner filed submissions on 7<sup>th</sup> June 2020.

She submits that there are two issues for determination;

**a) Whether this Honourable court is clothed with the jurisdiction to hear and determine disputes relating to the Environment and the use and occupation of land.**

**b) Whether this Honourable court can issue orders being sought in favour of the petitioners and as against the 5th Respondent.**

On whether this Honourable Court, to wit the ‘High Court’ is clothed with the jurisdiction to hear and determine disputes relations to the Environment and the use and occupation of land she submits that;

Article 162(2) (b) of the Constitution of Kenya 2010 empowers parliament to establish a court to hear and determine disputes relating to environment and Land. Section 13 of the Environment and Land Court provides for the jurisdiction of the Environment and Land Act.

The petitioners have moved /approached this Honourable court seeking for restraining orders against the 1st, 2nd, 3rd and 5th Respondents jointly and severally either by themselves and/or through their agents in respect of that parcel of land namely LR No. 3209/1 from further acts of interference on the suit land.

The petitioners are truly seeking that this Honourable Court hears and determines disputes relating to the trespass, occupation of, use, title and generally ownership of that parcel of land known as **LR NO. 3209/1** situated at Moiben Area, Uasin Gishu County.

Article 165 of the Constitution of Kenya, 2010 establishes the High Court and at Article 165 (3) it enumerates the jurisdiction of the high court but at Article 165 (5) it expressly bars the High court from hearing or determining any dispute that falls within the jurisdiction of courts contemplated in Article 162(2) of the constitution.

The petition filed before this Honourable court is a dispute relating to the use, occupation of and title to land which is the exercise of jurisdiction of the environment and land court and not the high court. Section 13 of the Environment and land court provides that disputes relating to Environmental planning, protection to property, land use, titles tenure and other natural resources and any other disputes to Environment and land is determined by the Environment and land court in accordance with Article 162(2) of the constitution of Kenya 2010. The petitioner’s prayers sought is akin to those provided under Article 162(2) of the constitution of Kenya 2010, read with Section 13 (1) (2) of the Environment and land court No. 19/11. Hence this court is bereft of the jurisdiction to hear and determine this petition which touches on the Environment and Land issues.

On whether this Honourable court can grant or issue orders in favour of the petitioners as against the 1st, 2nd, 3rd and 5th Respondents the 5<sup>th</sup> respondent submits that;

In the case of the **“Owners of Motor vessel “Lillian’s -vs- Caltex Oil Kenya Ltd (1989) KLR”** the court of Appeal held that;

**“Jurisdiction is everything, without it a court has no power to make one step. Where a court has no jurisdiction there could be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”**

Further the petitioners in the case of **Christopher Ngugi Mulwa & 28 Others-Vs\_ County Government of Kitui & 2 Others** Hon. Justice A. Angote held that: -

**“Consequently, and considering hat a dispute relating to land/or 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 two distinct courts.”**

The moment the court finds that it lacks jurisdiction, it has no power to grant or issue any orders and the only option is to strike out the notice of motion herein and the entire petition with costs to the 5<sup>th</sup> respondent.

## **RESPONDENT'S CASE**

The Petitioners submit this Honourable Court has jurisdiction to hear and determine all issues raised in the Petition under inter-alia Articles 23 (1), 165(3)(b) and that nothing obtains in the Petition that ousts the jurisdiction of this Court. ELC Court, under Articles 162 (2), 165(2), 165 (5) and Section 4 and 13 (2) Environment and Land Act has no jurisdiction to address all and the whole dispute raised in the Petition this Jurisdiction of ELC being limited to;

**a) Land's environment, title use, possession, control, compulsory acquisition**

**b) Constitutional matters touching on clean and unhealthy environment.**

**Articles 42, 69 and 70**

**II. It has no jurisdiction over inter-alia**

**a) Criminal cases including Appeals, reviews and hearings. In this case there are criminal cases No. E1430 of 2021, E1443 of 2021 and E1518 of 2021 before the Chief Magistrate's Court which in this Petition prays should be quashed.**

**b) Motions for redress of a demand violation and infringement of, and threats to rights and freedoms in the Bill of rights**

**c) Motions to determine whether if rights fundamental freedoms under the bill of rights have been denied, violated, infringed and threatened as contended in this case.**

The Petitioners submit that this Court has jurisdiction where matters in the cause are a mixture of causes of action, exceeding the limited scope of ELC judgment.

The High Court shall have any other jurisdiction, original or appellate, conferred on it by legislation. The respondents cite Article 165(3) of the Constitution 2010 in support of this submission. The respondent cites the case of **Republic v Karisa Chengo & 2 others [2017] EKLK**.

The Petitioner submits that dominant issue in this case is the violation of the 1st to 4th Petitioner's human rights and freedoms using the police force to seize and take away property already adjudged to belong bona-fide to the 1<sup>st</sup> Petitioner. The applicant cited the case of **Honey Creepers Investment Limited v Cab Investments Company Ltd & 4 others [2020] EKLK** in support of this submission.

The 5th Respondent herein, who is raising the preliminary objection, has already obtained orders in ELD H.C.C.NO. E001 OF 2021 before this High Court to the effect that all issues and matters relating to her claim, occupation and use of the parcel does not lie with the Environment and Land Court but before this court.

That order has not been overturned. The 5th Respondent cannot approbate and reprobate on her position and postulation before this High Court. The respondent cited the case of **High Court Civil Suit No. E001 OF 2021 Mary Juster Chepleting Vs Evans Kemboi Koech** in support of this submission.

The Petitioners submit that the objection is not a preliminary objection in law as it is based on contested facts and it additionally contests facts of the case, and raises contested. Based on the proposition that a Preliminary Objection is based on uncontested facts, the main-most fact on the face of the pleadings is that the 1st Petitioner is the registered owner of the parcel. Hence he cannot be upheld in the interest of justice.

A preliminary objection should be purely based on law and not on matters of facts as was held in the matter of **Maganlal Motichand Chandaria & 6 others v Paresh Kumar Dodhia [2017] Eklr**.

In conclusion the Petitioners submit that High Court has unlimited original jurisdiction on all constitutional matters including those raised by the Petitioners.

The dispute is not an entirely and limited matter of lands environment use, occupation and trespasses but includes questions of; -

**a. Use and misuse of police power and use of public resources by especially the OCS and deputy OCS, 1st and 2nd Respondents, and correlated abuse of office by 1st, 2nd and 7th Respondents.**

**b. Propriety of (i) interests, (ii) threats of arrest, (iii) prosecution for alleged assault and trespass, matters outside the preview of Environment and Land Court.**

**c. Fairness of, and right to seek the quashing of the magistrate's court to entertain and determine implicated charges and criminal process.**

**d. Property rights of the 1st petitioner and rights to (i) protection from inhuman treatment, (ii) Rule of law due to the petitioners.**

*e. Extend and implication of any breaches of obligation to maintain integrity by the 1st and 2nd Respondents/OCS and Deputy OCS.*

## ISSUES FOR DETERMINATION

1. Whether the court has jurisdiction to handle the suit.

### WHETHER THE COURT HAS JURISDICTION TO HANDLE THE SUIT

The preliminary objection is premised on jurisdiction. The locus classicus on jurisdiction is the case of *Owners of Motor vessel "Lillian's - vs- Caltex Oil Kenya Ltd (1989) KLR* where the court of Appeal held that;

***“Jurisdiction is everything without it a court has no power to make one step where a court has no jurisdiction there could be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”***

The main challenge of jurisdiction is on the point that the dispute herein touches on the use, trespass and occupation of the parcel of land known as LR No. 3209/1 measuring 305 acres situated in Moiben Sub County Arbarbuch Area Uasin Gishu County. The applicant seeks to have both the petition and the application dated 20<sup>th</sup> may 2021 thrown out.

The application does seek some orders relating to land use in prayers 2,4,6,7,8 and 9 of the notice of motion. The prayers sought in the petition, particularly prayers 8.1, 8.3, 8.5, 8.6, 8.7 and, 8.8 are orders relating to the use and occupation of land. However, I also note that there are other prayers sought which do not fall under this purview.

The respondents claim that the applicant obtained orders on HCCC E001 of 2021 to the effect that all issues and matters relating to her claim, occupation and use does not lie with the environment and land court. Unfortunately, there is no documentary evidence adduced to support this claim.

I also note that the orders sought in the petition are slightly similar to those sought in Eldoret E&L case no. 124 of 2017, annexed as MJC3 to the replying affidavit of the respondents filed on 3<sup>rd</sup> June 2021 in response to the notice of motion. The prayers therein however do not touch on the charges against and prosecution of the respondents. In my opinion, the arrest and prosecution of the respondents arise from trespass and therefore are a land issue.

In *Republic v Chief Land Registrar & another*

the land and eviction of persons on the land. In the premises the preliminary objection succeeds and the court has no jurisdiction to handle the matter as is. The same should be referred to the environment and land court.

**RULING FOR ELDORET DELIVERED VIRTUALLY AT MALINDI ON THIS 27<sup>TH</sup> DAY OF OCTOBER, 2021.**

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**S. M. GITHINJI**

**JUDGE**

**In the presence/absence of:**

1. Mr Manja holding brief for Mr Ngaira for the 6<sup>th</sup> Respondent
2. Miss Waweru holding brief for Mr Katwa for the Petitioner