



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**(Coram: A. C. Mrima, J.)**  
**PETITION NO. E278 OF 2020**

**RASHID IBRAHIM & 34 OTHERS.....PETITIONERS**

**VERSUS**

**MINISTRY OF LANDS AND PHYSICAL PLANNING.....1<sup>ST</sup> RESPONDENT**

**MINISTRY OF TRANSPORT INFRASTRUCTURE, HOUSING, URBAN**

**DEVELOPMENT AND PUBLIC WORKS (STATE DEPARTMENT OF**

**HOUSING & URBAN DEVELOPMENT).....2<sup>ND</sup> RESPONDENT**

**NAIROBI CITY COUNTY.....3<sup>RD</sup> RESPONDENT**

**PRINCIPAL SECRETARY LANDS.....4<sup>TH</sup> RESPONDENT**

**PRINCIPAL SECRETARY PHYSICAL PLANNING.....5<sup>TH</sup> RESPONDENT**

**PRINCIPAL SECRETARY HOUSING AND URBAN.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners filed a Petition dated 15<sup>th</sup> September 2020 seeking the following orders: -

- i. An Order to issue directing the 1<sup>st</sup> Respondent through the Cabinet Secretary of Lands to be restrained from processing and issuing Title Deeds/Certificates of Title relying on the list that has been provided by the Residents Committee to the 1<sup>st</sup> Respondent;*
- ii. An Order directing the 2<sup>nd</sup> Respondent to halt any activists in respect of the Korogocho Slum upgrading programme until the list of the beneficiaries has been verified and audited by all the parties herein;*
- iii. A Mandatory order be issued directing the Respondents to have a joint consultative meeting with all the listed Petitioners herein for the purposes of ascertaining the true and beneficial structure owners within the area of Korogocho in order to eliminate any irregularities and illegal beneficiaries;*
- iv. An Order to issue directing that the list of beneficiaries be verified through a transparent, open, clear and consultative process involving the Petitioners and under the supervision of the Kenya National Human Rights Commission;*
- v. The Court issues an order restraining the Respondents from dealing and engaging the Residents Committee in all matters in respect of the slum upgrading programme;*
- vi. The Court issues an order directing the Resident Committee of the Korogocho Community to cease any activities and operations*

*in respect of the slum programme with immediate effect;*

*vii. Cost of the suit and interest;*

*viii. Any other relief the Court deems fit.*

2. The Petition is brought on behalf of the residents of the Korogocho Community who, allegedly, have been affected by the processes and procedures of regularization of land ownership during the upgrading of the Korogocho Slum area. The Petitioners are entirely in support of the Korogocho Slum Upgrading Project (hereinafter referred to as '**the project**') but claim that the said regularization has been marred with gross illegality, corruption and outright disregard to the Constitution and the law. It is further claimed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents completely abandoned public participation in arriving at the final list of the *bona-fide* residents within the Korogocho community who are to benefit from the project.
3. The Petitioners assert that this has deprived them of their right to ownership of land.
4. The Petitioners further allege that their right to accessible and adequate housing under Article 43 of the Constitution has been infringed by the Respondents in colluding with the Residents Committee to displace the Petitioners from their homes and by granting non-residents the beneficial ownership of land through illegal sales and purchases. It is asserted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to engage the 3<sup>rd</sup> Respondents in the planning, execution and approvals of the 3<sup>rd</sup> Respondent's Development Plans as required under the law. Moreover, the principles of land policy of equitable access to land under Article 60 of the Constitution are also violated by the actions of the Respondents.
5. It is averred that the infringement of the rights of the residents of Korogocho community raises security tensions and thus threatens the peace and security within the area.
6. The Petition is supported by the Verifying Affidavit of Rashid Ibrahim sworn on 15<sup>th</sup> September, 2020 and his Supplementary Affidavit sworn on 8<sup>th</sup> October, 2020.
7. Save the 3<sup>rd</sup> Respondent, the other Respondents did not file any response to the Petition. They, however, through Counsel, tendered their legal arguments against the Petition.
8. The 3<sup>rd</sup> Respondent filed a Replying Affidavit in response to the Petition. It was sworn by Erick Odhiambo Abwao on 29<sup>th</sup> September, 2020. It is contended that the Petitioners have not established a cause of action against the 3<sup>rd</sup> Respondent and that the entire Petition is tainted with malice, unbaked appreciation of the law and hence incompetent. Furthermore, the matter does not meet the Constitutional threshold of a Constitutional reference. It is further contended that the matter involves land ownership and as such this Court lacks jurisdiction to in any manner whatsoever deal with it.
9. The 3<sup>rd</sup> Respondent further deponed that the proceedings before the Court seek the determination of competing private rights to property and thus can only be determined by a substantive suit for recovery of the said property in a Court with jurisdiction to determine the said rights by way of examination of documents and *viva voce* evidence.
10. It is further deponed that the Petition is premised on the wrong provisions of the law and that the orders sought should not be granted, as they are incapable of execution.
11. The 3<sup>rd</sup> Respondent also contends that the Petition is premature and against the provisions of the Physical Planning Act as the Petitioner should have moved the Liaison Committee before approaching this Court.
12. The Petition was heard by way of reliance on the affidavit evidence and written submissions. That was after the Petitioners abandoned their application for conservatory orders.
13. The Petitioner filed submissions dated 8<sup>th</sup> October, 2020. The Petitioners mainly submitted that they were not granted the opportunity to participate in the process of the allocation of land within the Korogocho Community where they had lived and owned land, that they were not informed of where, when and how the 2<sup>nd</sup> Respondent visited Korogocho community to conduct public participation and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to address many emerging issues within the project.
14. Consequently, the Petitioners submit that they are most likely to unfairly, unprocedurally and unlawfully lose their right to property as a result of the above unresolved issues.
15. To buttress the submission, the Petitioners rely on *Kiambu County Government & 3 others v Robert N. Gakuru & 3 others [2014] eKLR*; *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*; *Francis Chachu Ganya & 4 others v Attorney General & Another [2013] eKLR*; and *David Ngige Tharau & 128 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 2 others [2016] eKLR*.
16. The Petitioners further submit that the Respondents are in violation of Articles 10 (2) (a) and 43 (1) (b) of the Constitution by failing to involve all the persons affected by the project implementation. Furthermore, it is submitted that, the 2<sup>nd</sup> Respondent has violated Article 60 of the Constitution by failing to come up with a proper framework on the project implementation thereby resulting in secret and illegal dealings to the detriment of the residents.

17. The 3<sup>rd</sup> Respondent strenuously submitted that the Court is not seized of the jurisdiction over the dispute. It further submitted that the 3<sup>rd</sup> Respondent is not a necessary party in the suit as the Petitioner failed to demonstrate how the 3<sup>rd</sup> Respondent is to blame for all the allegations before Court.

18. The rest of the Respondents also joined the 3<sup>rd</sup> Respondent in calling upon this Court to find that it has no jurisdiction over the dispute. They further submitted that the matters raised by the Petitioners were policy issues and as such unjusticiable.

19. In a rejoinder, the Petitioners submitted that the Petition is brought under Article 23 and 165 of the Constitution and, that, the primary issue is not land ownership, but the manner in which the project is implemented.

20. Whereas the Petitioners prayed for judgment as prayed in the Petition, the Respondents unanimously prayed for the dismissal of the suit.

21. I have carefully considered the matters raised by the parties through their pleadings and submissions. I have also considered the decisions referred to by the parties.

22. I must, first, determine whether this Court has jurisdiction over the matter.

23. The Respondents are opposed to the jurisdiction of this Court on the basis of Article 162 of the Constitution and Section 13 of the Environment and Land Court Act.

24. *Jurisdiction* is defined in **Halsbury's Laws of England** (4<sup>th</sup> Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". **Black's Law Dictionary**, 9<sup>th</sup> Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.

25. In **Words and Phrases Legally Defined** Vol. 3, John Beecroft Saunders defines *jurisdiction* as follows:

*By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.*

26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. *Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1* expressed himself as follows on the issue of jurisdiction: -

*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...*

27. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in **Jamal Salim v Yusuf Abdulahi Abdi & another** Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

*Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in **Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;***

1) .....

2) *The jurisdiction either exists or does not ab initio ...*

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.*

28. On the centrality of jurisdiction, the Court of Appeal in **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** stated that: -

*So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.*

29. On the source of a Court's jurisdiction, the **Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows: -

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 counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power 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.

30. **And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR***, the Court of Appeal further stated: -

*[44] ... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court..*

31. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or both.

32. **Contextualizing the above in this matter, the guiding provisions are Articles 165(3) and (6) and 162 of the Constitution and Section 13 of the Environment and Land Court Act** respectively. Article 165(3) and (6) elaborately sets out the jurisdiction of the High Court as follows:

(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.

(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.

33. Article 162(2) and (3) provides as follows: -

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

34. **The legislation contemplated under Article 162(3) is the Environment and Land Court Act.**

35. Section 13 thereof outlines the Environment and Land Court's jurisdiction as follows: -

(1) The Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

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

*(emphasis added)*

36. The issue of the jurisdiction of the specialized Courts has been determined with finality by the superior Courts in the famous **Karisa Chengo & 2 others v Republic case**. The Court of Appeal in *Karisa Chengo & 2 others v Republic* Civil Appeal Nos. 44, 45 & 76 of 2014 [2015] eKLR observed as follows: -

*The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in the Constitution for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment ... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in the Constitution of a statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court....*

37. **The matter was appealed to the Supreme Court in** Petition No. 5 of 2015 Republic vs. Karisa Chengo & 2 Others [2017] eKLR. The Supreme Court rendered itself as follows: -

*[50] ... Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another.*

*[51] .....*

*[52] In addition to the above, 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 jurisdictions 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 jurisdictions. 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.*

*[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “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).*

38. The foregoing is the obtaining legal position.

39. The matter, however, did not end there. A further problem arose. It was on the cases raising ‘cross-cutting’ or ‘cocktail’ or ‘mixed grill’ issues within either Courts.

40. Initially there were two schools of thought in the High Court on the matter. One school favoured the ‘**pre-dominant purpose test**’ whereas the other school rooted for the ‘**pre-dominant issue before Court test**’.

41. The proponents of the former include *Ngugi, J* who rendered himself in ***Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another (2016) ECLR*** as follows: -

23. *When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.*

24. *The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.*

41. *Munyao, J* was for the other test. In ***Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another [2018] eCLR*** the Learned Judge argued as follows: -

25. *..... On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.*

42. The Court of Appeal had an occasion and dealt with the issue. In ***Co-operative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others***, Civil Appeal No. 83 of 2016 [2017] eCLR, the Court dealt with the issue as follows: -

**[30] Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as *Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine)* which translates to ‘whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell’. As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well.....**

**[31] Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it.”**

**[35] ...[F]or land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted.**

43. The Court of Appeal, therefore, settled for the ‘**pre-dominant purpose test**’. Therefore, that is the test I will use in this case.

44. The dispute before Court relates to the manner in which the project is implemented. The purpose of the project is to upgrade the socio-economic status of the Korogocho community by issuing land ownership documents to all the residents lawfully residing within the community. It is for that reason that the Petitioners are opposed to the final list of the residents used in further implementation of the project. Therefore, in the end, the project intends to yield Certificates of Title or Certificate of Leases, as the case may be, to the approved residents.

45. **Section 30(3) of the Land Registration Act, No. 3 of 2012** provides for the legal effect of Certificates of Title or Certificate of Leases as follows: -

**A certificate of title or certificate of lease shall be *prima facie* evidence of the matters shown in the certificate, and the land or lease shall be subject to all entries in the register.**

46. From the guidance of the Court of Appeal in the ***Co-operative Bank of Kenya Limited case (supra)*** and the above analysis, there is no doubt that the project deals with land ownership. The dispute before Court is, without doubt, on title to land. In that case, the jurisdiction of the High Court is expressly ousted under Article 162(5)(b) of the Constitution.

47. The foregoing discussion is sufficient to dispose of this matter. Dealing with the rest of the issues will add no value to the matter and may only be for academic purposes.

48. Consequently, the Petition dated 15<sup>th</sup> September, 2020 be and is hereby struck out. Each party shall bear its own costs.

49. Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 17<sup>th</sup> day of November 2020**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Salim, Counsel instructed by Messrs. Salim Omar & Co. Advocates for the Petitioners.**

**Miss. Mwangi, Learned State Counsel instructed by the Honourable Attorney General for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents.**

**Mr. Nyakoe, Learned Counsel instructed by Messrs. Momanyi & Associates Advocates for the 3<sup>rd</sup> Respondent.**

**Dominic Waweru – Court Assistant**