



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 12 OF 2018

**IN THE MATTER OF ARTICLES 43 (1)(b)(c), 47 AND (d) AND ARTICLE 28 OF THE CONSTITUTION OF KENYA
RELATING TO DEMOLITION OF HOUSES AND STRUCTURES BELONGING TO 2000 RESIDENTS OF LR 12610/1 AND
MEMBERS OF WORLDWIDE FREIGHTERS LIMITED**

AND

IN THE MATTER OF ARTICLES 2(6), 19, 20, 22, 23, 26, 29, 39, 40 47 AND 48 OF THE CONSTITUTION

AND

**IN THE MATTER OF ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), ARTICLE 11 OF
THE INTERNATIONAL COVENANT OF ECONOMIC, SOCIAL AND CULTURAL RIGHT (ICESCR), ARTICLE 17 OF THE
INTERNATIONAL COVENANT OF POLITICAL AND CIVIL RIGHTS AND ARTICLE 18 OF THE AFRICAN CHAPTER OF
HUMAN AND PEOPLE RIGHTS (ACHPR) AS APPLIED IN KENYA UNDER ARTICLE 2(5) & (6) OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM)
PRACTICE AND PROCEDURE RULES 2013, RULE 3, 4, 5, 9 AND 10**

BETWEEN

WORLDWIDE FREIGHTERS LTD & 19 OTHERS

(Suing on their behalf and 2000 other

residents of LR 12610/1 Mavoko).....PETITIONERS

VERSUS

HON. ATTORNEY GENERAL OF KENYA.....1ST RESPONDENT

COUNTY COMMISSIONER,

MACHAKOS COUNTY.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

AND

DELIVERANCE CHURCH

REGISTERED TRUSTEES.....INTERESTED PARTY

RULING

The Parties

1. The petitioners herein are described as 2000 residents of Land Parcel No. 12610/1 in Ngelani Sublocation of Machakos County (hereinafter referred to as “the suit land”) where they live with their families and have constructed thereon permanent houses which they use as their homes, shops, places of businesses, churches and schools.
2. The 1st respondent is the Attorney General of Kenya, an office created by Article 156 of the Constitution and is sued in a representative capacity on behalf of the Inspector General of Police, the Ministry of Interior and Co-ordination of National Government under which the County Commissioners fall and the Ministry of Lands and Housing and Urban Development.
3. The 2nd Respondent is an office in the Public Service and is one of the 47 County offices in the Ministry of Interior and Co-ordination of National Government, in charge of Machakos County.
4. The 3rd Respondent is the National Land Commission, a Commission established under Article 67 of the Constitution.

The Petitioners’ Case

5. According to the petitioners, they and their parents have lived on the suit land since the 1940’s during the colonial days when their parents squatted on the white settlers’ land then owning the land under the colonial policy then prevailing while providing cheap labour to the colonialists. According to them, they subdivided the suit land and have, openly, without any interruption, disruption, disturbance or rival claim of ownership being made over the land even after their parents passed.
6. It was the petitioners’ belief that the original white settler who owned the said land is either dead or cannot be found or has surrendered the land to the Government. This belief was fortified by a public advertisement made by the 3rd Respondent in the *Daily Nation* of 28th February, 2018 inviting applications for allotment of the suit land among others. Pursuant thereto the petitioners forwarded their presentations that they were the owners of the land which they have occupied with their parents since the 1940s.
7. It was however pleaded that on 18th June, 2018, the 2nd Respondent, leading a contingent of administration and regular policemen unlawfully and without a court authorisation entered the suit land and using bulldozers, crow bars and other implements brutally demolished some shops and houses belonging to the petitioners in an effort to evict them causing them serious damage. As a result, a large number of residents were severely injured by falling buildings while others were clobbered mercilessly by police using guns and clubs leading to permanent physical injuries to some of the residents.
8. It was pleaded that the said demolition only stopped when members of the public intervened and demonstrated against the said officers and the matter was reported at Athi River Police Station under OB No. 20/3/18. It was averred that the 2nd Respondent had not given the Petitioners notice of intention to evict them or demolish their homes and structures or served them with a Court judgement or any evidence of authority under whom the said buildings and structures were being pulled down.
9. It was the Petitioners’ belief that there is a conspiracy between the 2nd Respondent, the police and some private individuals to use force in order to effect the demolitions clandestinely to undermine the Petitioners’ legal rights and prevent them from filing a suit in court for adverse possession or any that may cancel the existing titles and confer title upon them. The Petitioners were apprehensive that they are likely to be rendered homeless by the illegal invasion by the 2nd Respondent leaving them shelter less, without food or medicines and that their children can no longer go to school following the destruction of their school.
10. To the Petitioners, the said actions of the police is a gross violation of human rights, a brutal attack on their human dignity and a contravention of their social and economic rights as enumerated in Article 43 of the Constitution and other international human rights instruments. It was their case that the said demolition which involved a massive operation by the police contravened the ***UN Basic Principles and Guidelines on Developed Based Evictions and Displacement***. To the Petitioners, the further intended demolition by the Respondents will further undermine their legal rights and dispossess them of their land, expose them to the vagaries of nature without shelter, food and medicine and that in particular the demolition contravened and will further contravene Articles 2(6), 21, 25, 26, 28, 29, 37-43 and 45-58 of the Constitution; Article 25 of the ***Universal Declaration of Human Rights*** relating to enjoyment of a reasonable standard of living adequate for their health and well being of themselves and their families; Article 11 of the ***International Covenant on Economic, Social and Cultural Rights*** in particular rights to Housing and Shelter, adequate food, work, health and protection of the family; and Articles 14, 15, 16 and 18 of the ***African Charter on Human and Peoples Rights***.
11. The Petitioners therefore sought the following reliefs:

1) Declaration that the, violent and brutal demolition of homes of the petitioners on 18-6-2018 without according them alternative shelter and or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to accessible and adequate housing, reasonable standards of sanitation, health care services, freedom from hunger and the right to clean and safe water in adequate quantities guaranteed by Article 43 (1) read with Articles 20 (5) and 21 (1), 2(2) and (3) of the Constitution of Kenya 2010.

2) Declaration that that the forcible, violent and brutal demolition of homes of the petitioners on 18-6-2018 without any warning or reasonable notice in writing or availing them information regarding the evictions and without according them alternative shelter and/or accommodation and leaving them to live in open exposed to the elements and vagaries of nature is a violation of their fundamental rights to inherent human dignity and the security of the person guaranteed by Articles 28

and 29 (c), (d) and (f) of the Constitution of Kenya, 2010.

3) Declaration that the forcible, violent and brutal demolition of homes of the petitioners without warning, any or reasonable notice in writing of availing them information regarding the evictions is a violation of their fundamental rights of access to information guaranteed by Article 35 (1) of the Constitution of Kenya 2010.

4) Declaration that the forcible, violent and brutal demolition of homes of the petitioners and damage to their household goods in the process and without according them an opportunity to salvage any of their belongings is a violation of their fundamental right to protection of property guaranteed by Article 40 (1), (3) and (4) as read with Article 21 (3) of the Constitution of Kenya 2010.

5) Declaration that the violent and brutal demolition of homes of the petitioners, any or reasonable notice in writing or availing them information and reasons regarding the demolitions and evictions is a violation of their fundamental right to fair administrative action guaranteed by Article 47 of the Constitution of Kenya 2010.

6) Declaration that the forcible, violent and brutal demolition of homes of the petitioners without according them alternative shelter and/or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to physical and moral mental health and the fundamental right to physical and moral health of the family under Article 16 and 18 of the ACHPR read with Article 2 (2) of the Constitution of Kenya 2010.

7) Declaration that the forcible, violent and brutal demolition of homes of the petitioners without according their children alternative shelter and/or accommodation and leaving the children to live in the open to the element and vagaries of nature is a violation of the fundamental rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by Article 53 (1), (b), (c) (d) and (2) read together with Article 21, (3) of the Constitution of Kenya 2010 and Article 28 of the ACHPR read with Article 2 (6) of the Constitution of Kenya 2010.

8) Declaration that the forcible, violent and brutal demolition of homes of the elderly persons among the petitioners without according them alternative shelter and/or accommodation rendering them to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the elderly persons to the pursuit or personal development, to live in dignity, respect and freedom from abuse and to receive reasonable care assistance from the state guaranteed by Article 57 (b), (c) and (d) as read with Article 21 (3) of the Constitution of Kenya 2010.

9) Declaration that the respondents jointly and severally or either of them are liable to the petitioners for the loss of personal real or other properties or goods including right or interest in property suffered by the during the forced eviction.

10) Order that the respondents jointly or severally do pay compensation to the petitioners for the loss of personal real or other properties or goods including right or interest in property suffered by them during the demolition exercise.

11) Order that the respondents do pay the petitioner general, aggravated, exemplary and punitive damage against the respondents jointly and/or severally and that such general, aggravated, exemplary or punitive damages as may be assessed by the honourable court.

12) Costs of this petition.

Interested Party's Case

12. The Petition was, however opposed by the interested party, **Deliverance Church Registered Trustees**.

13. According to the interested party, it is the legal proprietor of LR No. 12610/36 (Original Number 12610/1/11), LR No. 12610/37 (original number 12610/1/12), LR No. 12610/38 (original number 12610/1/13) being subdivisions of the suit parcel of land otherwise known as Munyeti Farm.

14. It was the interested party's case that on or about 14th June, 1994, and 5th September, 1994, it purchased at a consideration the parcels comprising the aforesaid subdivisions from BAT Kenya Limited and upon purchase, it sought to amalgamate, subdivide and change use of the same from the Commissioner of Lands who subsequently sought and received approvals from various Machakos District Officers for the proposes subdivision/amalgamation and change of user of LR Nos. 12610/36-38 Mavoko Municipality. It was pleaded that as a result a conditional approval was given to the interested party by the Commissioner of Lands vide his letter dated 11th September, 2002 and the interested party was duly informed through its contracted surveyor and the interested duly paid for the approval for change of user on 22nd October, 2003. Consequently, the Commissioner of Lands vide his letter dated 24th October, 2003 accorded the interested party the final approval enclosing the subdivision scheme plan and the interested party was issued with an amalgamated Registration of Title and deed plan dated 1st September, 2007.

15. According to the interested party, it has been in possession of the consolidated title for the said parcel of land since 1994 which title was later subdivided and some of the beneficiaries have processed the transfer and registration of their respective parcels. However, in or about November, 2017, the Petitioners without consent or authority or any colour of right unlawfully invaded and/or encroached onto the interested party's aforementioned land and the rest of the suit property and put up a structure thereon (a sales office) to fraudulently sell the interested party's land to unsuspecting individuals. As a result, the interested party on or about 14th November, 2017 reported the trespass to the police at Mavoko Police Station under OB 20/14 of November, 2017.

16. On 28th February, 2018, the 3rd Respondent through a notice published in the Daily Nation notified the public of its intention to allocate land listing the suit property as one of the properties under consideration. By letters dated 6th and 20th March, 2018, the interested party complained to the County Commissioner, Machakos, the 2nd Respondent, with respect to the trespass on the suit property asserting its rights thereto and attaching a copy of the title confirming the same. Upon reviewing the complaint, on 23rd March, 2018, the 2nd Respondent referred the interested party to the office of the Assistant County Commissioner, Mlolongo who referred the matter to the Deputy County Commissioner and after listening to the interested party's complaint, the said DCC's office summoned the team that had allegedly invaded the suit property to hear their side of the story. Accordingly, on 4th April, 2018 the interested party and the said invaders appeared before the DCC's Subcounty Security and Intelligence Committee (SCSIC) and upon request of proof of ownership of the suit property, only the interested party produced title documents proving the same while the Petitioners claimed that they were allocated land by the National Land Commission's (the 3rd Respondent) Chairperson, **Mr Mohammed Swazuri**. Pursuant to the said allegations, the parties were referred to the 3rd Respondent's Office to verify the said claims.

17. The interested party averred that it delivered to the DCC's office a copy of the letter dated 17th April, 2018 signed by the 3rd Respondent indicating that the 3rd Respondent has not allocated any land to anybody in Katani/Ngelani Area of Mavoko. The letter elaborated that the 3rd Respondent's notice of 22nd February, 2018 referred to by the Petitioners was only seeking information from persons claiming ownership of the suit land and those with interest to submit theirs for the same. It was further averred that the ownership dispute between the Petitioners and the Interested Party was also discussed by the Athi River County Security and Intelligence Committee meetings during which the team noted that the Interested Party was the only party that presented proof of ownership of the suit land. The Interested Party therefore refuted the allegations by the Petitioners that the 2nd Respondent led a contingent of police officers in unlawfully demolishing the Petitioners' properties and attacking them.

18. It was disclosed that on 30th October, 2018, the 3rd Respondent published a cancellation Notice of intention to allocate the land. It was the Interested Party's case that contrary to the allegations made by the Petitioners, on 18th June, 2018, the Assistant County Commissioner, the Athi River police, the Chief Katani and the Deputy County Commissioner visited the suit property where they found the interested party conducting a demolition of the invaders' structures but they did not at any point participate in the said demolition nor clobber or injure the residents. The same day, the county leadership held a discussion with the said invaders and the interested parties whereat it was agreed that the ground be surveyed by a government surveyor in order to establish the boundary of the parcel of land owned by the interested party. According to the interested party, having asserted its rights to the suit land, the limitation period for the purposes of adverse possession stopped running hence the petitioners' claim has no legal basis.

19. The interested party lamented that despite many notices to the Petitioners and intervention of the Athi River Police Station, the Petitioners have failed, refused and neglected to give the interested party vacant possession of the suit property without any legal right or basis hence depriving the interested party of its full use and enjoyment of the suit property following the issuance of conservatory orders by this court on 6th July, 2018.

Determination

20. I have considered the issues raised herein. Before proceeding to determine the issues raised herein, it is imperative that this court determines whether it has jurisdiction to hear and determine the issues raised herein.

21. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1**, Nyarangi, JA expressed himself as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance 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 the 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

22. Similarly, the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself 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 counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where

the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

23. Several decisions have been handed down by the courts regarding the issue of jurisdiction particularly what amounts to want of jurisdiction. As was held by **Ochieng, J** in **Sammy Likuyi Adieme vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 Of 2003**, a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute *ab initio*, in which case it ought to down its tools before taking one more step as was held in **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (K) Ltd [1989] KLR 1**. It may also be that though the Court has jurisdiction to enter into the inquiry concerned it lacks the jurisdiction to grant the relief sought. It was therefore held by **Sir Udo Udoma, CJ** in **Uganda General Trading Co. Ltd vs. N T Patel Kampala HCCC No. 351 of 1964 [1965] EA 149**, expressed himself as follows:

“The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law... The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity.”

24. Article 165(3) of the Constitution provides as follows:

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

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

.....

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

25. Article 165(5)(6) and (7) thereof on the other hand provides:

(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).

(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.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

26. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

27. However, the High Court’s power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

28. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which **fall within the jurisdiction of the courts contemplated in Article 162(2)** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to “determine the jurisdiction and functions of the courts contemplated in clause (2)”, Parliament did enact **The Environment and Land Court Act, 2011** which Act commenced on 30th August 2011. Section 13 of the said Act provides as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes 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.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

29. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. Accordingly, section 13(2)(e) must be read *ejusdem generis* the preceding provisions. However, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution. As was held by this Court in Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others**:

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

30. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by Justice Mohammed Ibrahim in **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR**:

“A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court.”

31. In this case, at the time these proceedings were instituted, a cursory perusal of the pleadings revealed that the substance of the dispute

was whether the Respondents in acting in the manner they allegedly did violated the Petitioners' constitutional rights. It is however not lost to the court that there was an allusion to a claim for a right to occupy the suit land arising from long possession of the land by the Petitioners and their fathers. That particular issue was clearly vaguely alluded to in the petition. However, by the entry of the interested party to these proceedings, it became clear that at the core of the litigation is a dispute regarding the title to land that has to be resolved if the orders sought herein are to be granted. That is clearly appreciated by the Petitioners in their Notice of Preliminary Objection dated 19th June, 2019.

32. In my view this matter substantially falls within the jurisdiction of the ELC. I agree with the position adopted by **Majanja, J in United States International University (USIU) vs. Attorney General Nairobi Petition 170 of 2012 [2012] eKLR**, in which he expressed himself *inter alia* as follows:

“[41] 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 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. Such a situation would lead precisely to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current court

[43] The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibit the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters of their competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).

[44] The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.”

33. Although the Court was dealing with an employment dispute, in my view the principles are basically the same.

34. In this case, I am satisfied that this dispute can be properly dealt with by the ELC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in **Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012**, [para. 29-30] where it was held:

“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework.”

35. Similar sentiments were expressed in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

36. The demarcation of the jurisdiction between the High Court and Courts of equal status was the subject of Supreme Court's decision in **Petition No. 5 of 2015- Republic vs. Karisa Chengo & 2 Others** where the Court expressed itself *inter alia* as hereunder:

“it is obvious to us that *status* and *jurisdiction* are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation...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.”

37. In this case, it is clear that even if this Court were to hear this matter the substratum of the dispute would remain unresolved. However, it is my view that the dispute herein falls squarely within the provisions of section 13(2) of the *Environment and Land Court Act*. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the Petitioners’ contended rights stem from their yet to be determined interest in the suit land.

38. Having considered the issues raised herein I associate myself with the sentiments of the Court in *East African Railway Corp vs. Anthony Sefu [1973] EA 237*, where it was held that:

“It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”

39. It is my view that in the circumstances of this case, it would not advance the course of justice to terminate these proceedings.

40. In this case, since I am satisfied that the dispute can be properly dealt with by the ELC, the order which commends itself to me and which I hereby make is that further proceedings will be undertaken by the ELC since the said Court is a Court of equal status as the High Court and is empowered to grant the reliefs sought herein.

41. The costs will be in the cause.

42. Orders Accordingly.

Ruling read, signed and delivered in open Court at Machakos this 24th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Kimani for the Interested Party

CA Geoffrey