REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

[CORAM: KIMONDO, MWITA & OKWANY JJ]

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 398 OF 2015

DELMONTE KENYA LIMITED.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MURANG'A.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner is a wholly owned subsidiary of *Fresh Del Monte Produce Inc.*, an American corporation listed on the New York Stock Exchange. Its core business in Kenya is large scale pineapple farming, processing and export.

2. The petitioner is the registered owner as lessee from the Government of the Republic of Kenya of Land Reference Numbers 12157, 12157/2, 12157/3, 12157/4, 12157/5 and 13289 located within Murang'a County and LR 12158 located partly in Murang'a and Kiambu Counties. The leases are due to expire in the year 2022.

3. The petitioner's case is that the County Government of Murang'a (the 1st respondent) has unreasonably and illegally withheld a *letter of no objection* to the renewal of the leases by demanding that it cedes a portion of its land to the 1st respondent. The conduct of the 1st respondent is faulted for violating the petitioner's right to private property; for offending the right to a fair hearing and for being discriminatory.

4. The petitioner thus craves for a *declaration* that its right to property has been violated; and, that the conditional demand to cede a portion of its land to the 1st respondent is illegal and blatantly unconstitutional. There is also a prayer for *prohibition* to stop those demands; and, for *mandamus* to compel the 1st respondent to forthwith issue *letters of no objection* to the extension of the leases.

5. In the alternative, a writ of *mandamus* is sought to compel the 1st respondent to give, within seven (7) days of the judgment, detailed *"reasons in writing based on sound, legitimate and lawful grounds"* why the leases should not be extended.

6. The petition is opposed by the 1st and 2nd respondents who pray that the petition be dismissed with costs.

7. On its part, the 1st respondent contends that the court lacks jurisdiction; that it has not interfered with the petitioner's right to the land; that the land shall revert to the 1st respondent on expiry of the leases; and, that the petitioner does not have pre-emptive or an automatic right to renewal of the leases.

8. The 1st respondent contends that the demand for surrender of a portion of the land to the public is reasonable and legitimate. It denies that it has discriminated against the petitioner. In a synopsis, the 1st respondent submitted that the petition is premature and does not lie.

9. The 2nd respondent's position on the other hand is that the process of extension of leases is purely an affair between the 1st respondent and the National Land Commission (hereafter NLC) which is not a party to these proceedings. The 2nd respondent further asserts that no prayers have been sought against it; and, that no cause of action is disclosed.

History of the petition

10. The petitioner initially brought proceedings against *three* respondents: the County Government of Murang'a (as the 1st respondent); the County Government of Kiambu (as the 2nd respondent); and, the Attorney General as the 3rd respondent.

11. On 20th September 2018, the petitioner and the County Government of Kiambu recorded a *consent* settling the dispute fully and more particularly in terms of the *Memorandum of Understanding* (MOU) dated 7th September 2018 and filed in court on 20th September 2018. One of the terms of the MOU required the petitioner to cede approximately 690 acres of land to Kiambu County in consideration for a *letter of no objection* to the renewal of leases over LR 12203/1, LR 12203/2 and part of LR 12158 for a further term of 99 years.

12. The consent conclusively settled the dispute between the petitioner and Kiambu County. That left the County Government of Murang'a and the Attorney General as the only respondents. We shall henceforth refer to them as the 1st and 2nd respondents respectively.

Petitioner's case

13. The petition is dated 18th September 2015 and filed on even date. There is a deposition by *Stergios Gkaliamoutsas*, the Managing Director of the petitioner of the same date; and, a further affidavit by the same deponent sworn on 10th November 2015.

14. He avers that on 1st October 2012, the petitioner applied for extension of the leases to the relevant local authority or successor to various government agencies in the County of Murang'a. Despite compliance with the statutory procedures, the 1st respondent delayed, refused or neglected to issue the *letters of no objection*.

15. The petitioner contends that despite earlier promises to extend the leases the 1st respondent reneged and instead asked it to apply afresh. The petitioner avers that the 1st respondent is blackmailing it to cede large portions of its land as a pre-condition for renewal of the leases. Reference was made to a letter of 26th May 2015 in which the 1st respondent requested the petitioner to allocate it at least 1500 acres along the Thika-Kenol Highway for "public use".

16. The petitioner contends that the 1st respondent's actions are illegal and unconstitutional and amount to expropriation of private land contrary to ***Article 40*** of the **Constitution**. It further contends that failure to issue the no objection letter amounts to unlawful revocation of its title. It relies on ***Samuel Murimi Karanja & 2 others v Republic***, High Court Criminal Application No. 412 of 2003 [2003] e KLR where the court held *inter alia*:

> ***"That once the President and the government issue a grant, the person therein accrues constitutional rights to that property and the government is estopped from interfering or acquiring that land save for the manner provided for under Section 75 of the Constitution."***

17. The petitioner argues that it holds an indefeasible title to the land. it relied on ***Satima Enterprises Ltd v Registrar of Titles & 2 Others,*** High Court, Nairobi Pet 217 of 2011[2012] eKLR, where *Majanja J* held:

> ***"****[9]…. **in my view the issue for determination is a narrow and straight forward issue; Whether the Registrar of Titles has authority to revoke the petitioner's title***.
>
> *[10]* ***A title to property however, acquired, has specific legal protection and in this case, section 23 of the Registration of Titles Act could not be clearer***…….
>
> *[11]* ***These cases I have cited establish the following principles: First, the Registrar of Titles has no authority under the Registration of Titles Act to revoke a title by way of Gazette Notice in the manner he did. Second, such revocation is a breach of Article 40 of the Constitution as it constitutes an arbitrary acquisition of property without compensation. Third, it is also a breach of [Article 47(1)] where it is clear that the petitioner was not given a hearing to contest the allegations subject of the revocation."***

18. The petitioner contends that it has a preemptive right for renewal of the lease. It relied on ***Serah Mweru Muhu v Commissioner of Lands & 2 Others*** High Court, Nairobi Pet 413 of 2012 [2014] eKLR where *Majanja* J held:

> ***"****[34]* ***The Commissioner [of lands] has admitted that the process of extension of the lease was started way back in 2009. That process was interrupted by the sale to the State. Under section 13(1) of the Land Act the lessee has the right of first refusal should the State wish to extend the lease. It provides that:***
>
> ***'Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.'***
>
> ***"In the absence of reasons for refusal to extend the lease, the lessee would be entitled to an extension of the lease"***

19. The petitioner also contends that it has been discriminated against because it is a foreign company. It alleged that senior officials from the

1st respondent threatened to have senior managers of the petitioner deported in order to coerce it to cede its land.

20. The petitioner asserts that it has put to full use all the land and that ceding the portions of land in the manner demanded by the 1st respondent would render its business economically unviable. The petitioner further argues that it will result in job loses.

21. The petitioner states that it has invested heavily in the business, employed over 7,000 workers and engaged in public causes including housing, schools, roads, dispensaries and so forth. The petitioner therefore argues that it has a legitimate expectation of full protection of the law so long as it complies with national and local legislation.

22. Regarding the doctrine of legitimate expectation the petitioner relied on ***Council of Civil Service Unions and others v Minister for the Civil Service*** [1984] 3 All ER 935, where Lord Diplock stated;

> ***"Legitimate expectation may arise either from an express promise given on behalf of a public authority, or from the existence of a regular practice which the claimant can reasonably expect to continue."***

23. The petitioner further relied on ***J. P. Bansal v State of Rajastan & another***, Supreme Court of India, Case Number Appeal (Civil) 5982 of 2001 cited with approval in ***Abdul Waheed Sheikh & another v Commissioner of Lands & 3 others,*** High Court Misc. Case No. 1531 of 2005 (O.S) [2012] eKLR.

24. In the ***J. P. Bansal Case*** [Supra], the Supreme Court of India stated:

> ***"The basic principles in this branch relating to 'legitimate expectation' were enunciated by Lord Diplock in Council of Civil Service Unions and others v Minister for the Civil Service [1985] 1 AC 374 (408-409) (commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced. In the above case, Lord Fraser accepted that the civil servants had a legitimate expectation that they would be consulted before their trade union membership was withdrawn because prior consultation in the past was the standard practice whenever conditions of service were significantly altered. Lord Diplock went a little further, when he said that they had a legitimate expectation that they would continue to enjoy the benefits of trade union membership, the interest in regard to which was protectable. An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous. It could be a representation to the individual or generally to class of persons"***

25. The petitioner contends that the 1st respondent has violated national values and principles of governance enshrined in ***Article 10*** of the **Constitution**; its right to equal protection of law and freedom from discrimination contrary to ***Article 27*** and its right to fair administrative action enshrined under ***Article 47***.

26. The petitioner submitted at length about the various steps it took towards extension of the leases. Pages 58 to 137 of the petitioner's exhibits detail correspondence relating to the applications for the renewal of leases to the Commissioner of Lands, the National Land commission and Thika Municipal Council among others.

27. The petitioner's case is that all the agencies approved the extension of the leases. It gave the examples of the Chairman Land Control Board, Thika Municipality, who gave approval on 2nd May 2013 for renewal of the leases for a further 49 years and subsequent approval by the NLC through its letter dated 22nd March 2016.

28. The petitioner submitted that the role of the 1st respondent was simply to issue a *letter of no objection* so that the Ministry of Lands could issue new leases. It argued that it had complied with all the conditions for extension and approvals granted. Hence the prayer for an order of mandamus against the 1st respondent.

29. The petitioner submits that the issue relating to land planning is the exclusive preserve of the national government under the *Fourth Schedule* to the **Constitution**. This function is to be exercised by the respective County Land Management Boards with advice from the Director of Physical Planning under section 5 of the **Physical Planning Act**.

30. It is the petitioner's case that the role of the 1st respondent on renewal of leases is minimal. It argued that the National Land Commission (NLC) is the only body empowered under section 13 of the **Land Act** to deal with the extension of leases. Reference was also made to section 29 of the **Physical Planning Act** on the roles of local authorities which do not include renewal of leases.

31. The petitioner avers that the conduct of the 1st respondent has denied it sufficient time to plan its activities considering that the farming cycle of pineapples spans three and a half years.

The 1st Respondent's case.

32. The 1st respondent relied on a *preliminary objection* dated 28th September 2015; and, a replying affidavit of *S.T. Masaki*, the Committee Member Executive in Charge (CMEC) for Lands, Housing and Physical Planning, sworn on 28th October 2015.

33. The deponent avers that the petition is premature because there were ongoing negotiations between the parties; and, that the leases have not expired. He further said that the petitioner did not exhaust the dispute settlement mechanisms provided by the **Physical Planning Act** prior to lodging this petition.

34. Regarding jurisdiction, the 1st respondent submitted that the proper forum should be the Environment and Land Court (hereafter *the ELC Court*). He cited ***Article 162*** of the **Constitution** and Section 13 of the **Environment and Land Court Act**

35. The 1st respondent also took issue with the supplementary affidavit by the petitioner sworn on 17th May 2016. It was ostensibly in reply to an anticipated affidavit by the 2nd respondent. The latter however did not file the affidavit. The 1st respondent submitted that the supplementary affidavit should thus be expunged particularly for sneaking in materials from the NLC purporting to show that the commission was not opposed to extension of the leases. The 1st respondent contends that the proper course was to enjoin the commission.

36. The 1st respondent contended that none of the petitioner's rights has been violated or threatened within the meaning of ***Article 27, 40 and 47*** of the **Constitution** to warrant invocation of ***Article 22***. It also denied breaching the **Physical Planning Act**. Accordingly, it contends that there is no basis for grant of the prayers in the petition.

37. The 1st respondent conceded there were negotiations under which the petitioner would cede 3000 acres to it as a pre-condition for extension of the leases. It however denied that it promised to issue a *letter of no objection*. It submitted that in any case the agreements and memorandum of understanding were not executed by the petitioner. It maintained that the doctrine of estoppel is inapplicable.

38. The 1st respondent further contended that the allegations of legitimate expectation over the property were an afterthought. Reliance was placed on ***Communication Commission of Kenya v Royal Media Services & 5 others***, Supreme Court of Kenya, Pet. 14A, 14B & 14C of 2014 [2014] eKLR. The court set out the test for legitimate expectation as:

> ***"****[269]* ***The emerging principles may be succinctly set out as follows:***
>
> ***(a) there must be an express, clear and unambiguous promise given by a public authority;***
>
> ***(b) the expectation itself must be reasonable;***
>
> ***(c) the representation must be one which it was competent and lawful for the decision-maker to make; and***
>
> ***(d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution."***

39. The 1st respondent also relied on ***Henry Muthee Kathurima v Commissioner of Lands & another*** Court of Appeal Civil appeal 8 of 2014 [2015] eKLR which cited with approval ***South African Veterinary Council v Szymanski*** 2003 (4) S.A. 42 (SCA) for the proposition that *"the law does not protect every expectation but only those that are legitimate"*.

40. The 1st respondent questioned the petitioner's claims of contribution to the economy or the efficacy of its Corporate Social Responsibility. Reference was made to annexture *SKM2* in which the relevant parliamentary committee heard allegations that trespassers to the suit property were mauled by the petitioner's dogs and their bodies dumped into lakes adjacent to the pineapple farms.

41. The 1st respondent also claimed the petitioner's business has damaged the environment through the use of hazardous pesticides. It was also contended that the petitioner engages in unfair labour practices.

42. The 1st respondent stated that it requires land for urbanization and housing and to achieve Vision 2030. Its learned counsel submitted that the County forms part of the Nairobi Metropolitan Regions as per *Gazette Notice No. Vl CXV 15* of 22nd March 2013 (annexeture *STM3*).

43. The 1st respondent stated that it requires 6000 acres for the proposed Murang'a City at Kabati area. It argued that the neighbouring coffee estates have been converted into housing and industrial estates such as Thika Greens Golf estate, Tatu City and Home Africa. It therefore contended that extension of leases is subject to the Constitution and the need for land for public use. It further contended that there should be public participation before the *letters of no objection* can be issued.

44. The 1st respondent submitted that there were alternative dispute resolution mechanisms under section 33 as read with section 13 of the **Physical Planning Act.** In its view the sections provide an efficacious and satisfactory remedy. Instead of exhausting those remedies, the petitioner lodged the petition. The 1st respondent relied on ***R v Kenya Revenue Authority ex parte Interactive Gaming & Lotteries***, Nairobi High Court Misc. Appl. 251 of 2014 (J.R.) [2016] eKLR where Odunga J. stated-

> ***"****[43]* ***In my view specialized bodies established under statutes ought to be given leeway to conduct their proceedings freely without unnecessary interference by the court".***

45. The 1st respondent was of the view that the petition was premature and the court should not entertain it. Reliance was placed on ***Speaker***

of the National Assembly v Njenga Karume [2008] 1 KLR 425; [1992] eKLR. The Court of Appeal held-

> ***"[W]here there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."***

46. Learned counsel cited section 9 (2) and (5) of **The Fair Administrative Action Act No. 4 of 2015** for the proposition that the High Court and subordinate courts should not review administrative decisions under the Act unless internal mechanisms for appeal or review and all remedies under written law are exhausted. He submitted that there are no exceptional circumstances in this case to exempt application of the statutory mechanisms.

47. To buttress the argument, counsel referred to ***Francis Mutuku v Wiper Democratic Party Kenya & 2 others***, Nairobi High Court Pet. 597 of 2014 [2015] eKLR where the High Court declined jurisdiction over a petition because the parties had not exhausted the dispute resolution mechanisms under the **Political Parties Act**.

48. The 1st respondent was of the view that since the leases will not expire until 2022, the present suit is premature. Reliance was placed on ***Vithalbhai Pvt. Ltd v Union Bank of India***, Supreme Court of India, Civil Appeal No 2390 of 2002.

49. The 1st respondent was of the view that whereas the NLC has power to manage land on behalf of the county government, it cannot divest the county of the power to decide if leasehold titles should be renewed. The 1st respondent argued it has a key role to play in the extension process since the land reverts back to it upon expiry of the leases.

50. Regarding the prayers in the petition, the 1st respondent submitted that the leases have not been revoked and that it has no intention to illegally acquire the petitioner's land or interfere with its quiet possession. It submitted that failure to extend the leases is not tantamount to compulsory acquisition.

51. It was the 1st respondent's case that in the instant case, and upon expiry of the leases, the petitioner's rights will be extinguished and that the land will revert to the 1st respondent in trust for the people of Murang'a County.

52. Lastly, the 1st respondent submitted that the petition was not pleaded with particularity. Reliance was placed on ***Anarita Karimi Njeru v Republic*** (1976 – 1980) KLR 1272; [1979] KLR 154; [1979] eKLR.

2nd Respondent's case

53. The 2nd respondent's case is that it is not a necessary party and no reliefs were sought against it. The 2nd respondent relied on *grounds of opposition* dated 20th September 2018. They are three-pronged: Firstly, that the dispute relates to extension of leases. The dispute is squarely between the petitioner, the 1st respondent and the National Land Commission. Secondly, no prayers have been sought against it; and, lastly that no cause of action is disclosed against it.

54. The 2nd respondent did not file written submissions. However in its oral submissions, learned counsel for the 2nd respondent associated himself fully with the submissions of the 1st respondent. He submitted further that the 2nd respondent has not violated the petitioner's rights. He prayed that the petition be struck out with costs.

Rejoinder by the petitioner

55. In response to the respondent's submissions, the petitioner argued that sections 9 and 13 of the **Land Act** do not bar non-citizens from seeking extension of their leases. The petitioner submitted that its land is not public land as contemplated under Part II of the Act. It argued that it had a legitimate expectation that its leases would be extended unless there were justifiable reasons for refusal.

56. The petitioner contended that the County Governments have no role in the renewal of leases. That mandate belongs to the NLC upon advice by the County Land Management Boards.

57. Relying on the decisions in ***Geothermal Development Co. Ltd v A.G. & others***, High Court Pet. 352 of 2012 [2013] eKLR and ***Muslim for Human Rights (MUHURI) v Minister for Immigration & 5 others*** [2017] eKLR the petitioner submitted that its rights to fair administrative action were violated.

58. Regarding the impugned supplementary affidavit sworn on 17th May 2016, the petitioner submitted that striking it out would defeat the interests of justice.

59. In summary, the petitioner's case is that it followed the right procedure for renewal of the leases but the 1st respondent has unreasonably withheld the *letters of no objection* in violation of its constitutional rights. It maintained that the court has jurisdiction to determine the dispute.

Issues for Determination

60. From the pleadings, submissions and the authorities we find that the issues for determination are as follows:

(a) Whether this court has jurisdiction to entertain the petition.

(b) Whether the petitioner exhausted alternative remedies before lodging the petition.

(c) Whether the 1st respondent has unlawfully or unreasonably withheld the *letters of no objection* to the extension of the petitioner's leases.

(d) Whether the constitutional rights of the petitioner have been infringed.

(e) Whether the petitioner is entitled to the reliefs sought.

(f) Who should bear the costs?

Analysis and disposition

61. The respondents opposed the jurisdiction of this court to hear and determine this petition on the basis that ***Article 162*** of the **Constitution** and section 13 of the **Environment and Land Court Act** vest the jurisdiction to the Environment and Land Court (ELC).

62. The initial objection to jurisdiction was raised at the interlocutory stage before the empanelment of this three-judge bench. In a ruling delivered on 1st October 2016, *Onguto J.* declined to transfer the matter to the ELC. He found that the facts in the petition did not exclusively relate to title, use or occupation of land as contemplated under ***Article 162*** of the **Constitution** as read with section 13 of the Act. He also found that the petitioner was claiming violation of fundamental rights guaranteed by ***Articles 1, 10, 27, 40, 42, 47*** and ***69***. He was of the view that since the High Court has original jurisdiction under ***Article 165***, there was concurrent and co-ordinate jurisdiction between the two courts.

63. The learned judge held:

> ***"Where there exists concurrent jurisdiction, there must exist a coordinate jurisdiction. Both courts must be willing to support each other through ordinary case management or otherwise. It entails a balancing situation where the court seized with the matter must determine whether it may be more appropriate for the other court to handle the matter or whether it is appropriate for the court then seized to continue handling the matter: see also The Spiliada [1987] AC 460."***

64. The issue of jurisdiction was once again raised before us by counsel for the respondents at the commencement of the hearing of this petition. We noted that since the issue had been addressed by the single judge, the more appropriate course was for the parties to canvass the matter fully during the hearing of the petition.

65. Having heard the parties we find that this is the opportune moment to deal conclusively with the issue of jurisdiction. We are alive to the fact that we are not sitting on appeal against the ruling of the single judge. However, the decision of the single judge at the interlocutory stage is not binding on the bench. Furthermore, we take cognizance of the fact that the ruling by the single judge was delivered before the Supreme Court decision in ***Republic v Karisa Chengo & 2 others,*** Petition No. 5 of 2015 [2017] eKLR.

66. Needless to say, our finding on the issue of jurisdiction will determine whether we should deal with all the other issues raised in this petition.

67. In legal systems all over the world, *jurisdiction* is a critical concept in litigation. ***Halsbury's Laws of England*** (4th Ed.) Vol. 9 at page 350 thus defines 'jurisdiction' 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."*

68. John Beecroft Saunders in his treatise ***Words and Phrases Legally Defined*** Vol. 3, at page 113 reiterates the above definition as follows:

> ***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to 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 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 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".***

69. ***Black's Law Dictionary***, 9th Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.

70. The significance of jurisdiction cannot be gainsaid. Any court acting without jurisdiction would be employing its energy, time and resources in futility. The issue of jurisdiction is so critical that it can be raised at any stage of the proceedings. In ***Jamal Salim v Yusuf Abdulahi Abdi & another*** Civil Appeal No. 103 of 2016 [2018] eKLR the Court of Appeal stated:

> ***"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."

71. In ***Orange Democratic Movement v Yusuf Ali Mohamed & 5 others***, Court of Appeal, Civil Appeal No. 37 of 2018 [2018] eKLR, the court observed:

"[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..."

72. Underscoring the centrality of jurisdiction, *Nyarangi, J.A.* in the celebrated case of ***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…"

73. In the case of ***Samuel Kamau Macharia & Another v Kenya Commercial Bank and 2 others***, Supreme Court Application No. 2 of 2011 [2012] eKLR the Supreme Court stated:

"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...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."

74. The common thread running through the above cited decisions is that the court's jurisdiction is derived from the Constitution, an Act of Parliament or both.

75. ***Article 165(3)*** and ***(6)*** of the **Constitution** 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."

76. ***Article 162(2)*** on the other hand empowers Parliament to 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."

77. Sub-Article (3) thereof authorizes Parliament to determine the jurisdiction and functions of the courts contemplated in Sub-Article (2). Pursuant to ***Article 162(3)*** of the **Constitution**, Parliament enacted the **Environment and Land Court Act**.

78. Section 13 of the Act outlines the ELC'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 manaement;***
>
> ***(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."***

79. In ***Karisa Chengo & 2 others v Republic***, Civil Appeal 44, 45 & 76 of 2014 [2015] eKLR, the Court of Appeal took a trip down the memory lane on the rationale behind the establishment of the ELC. The court analysed the final report of the Committee of Experts on constitutional review. The court observed-

> ***"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."***

80. In a further appeal to the Supreme Court in ***Republic v Karisa Chengo & Others*** Petition No. 5 of 2015 [2017] eKLR, the 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."***

81. ***Article 165(5)*** of the **Constitution** expressly prohibits the High Court from dealing with any matter reserved for the exclusive jurisdiction of the ELC. This was succinctly captured by the Supreme Court in ***Republic v Karisa Chengo & Others*** [Supra] as follows-

> *"[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)".***

82. The above decision conclusively settled the previously vexing question of the jurisdiction of the High Court and the courts of equal

status.

83. However, there are cases that raise cross cutting issues that may fall within the jurisdiction of *either* court. In such instances the guiding light should be the *dominant issue*. In ***Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others***, Civil Appeal No. 83 of 2016 [2017] eKLR, the Court of Appeal adopted a double-pronged approach when considering whether a charge over land amounted to *land use* for which the High Court would have no jurisdiction. Firstly, the Court made an exposition of the terms *land* and *land use* 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."***

84. The above definition then set the stage for the determination of what constitutes *land use*. The Court observed:

> ***"****[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."***

85. Given that backdrop the Court held that a *charge* did not constitute *land use*. It distinguished *land use* from a *charge* and found that the latter is an interest in land purely for securing the payment of money or money's worth limited to the realization of the security which has nothing to do with use of the land as defined above.

86. The court then went on to hold, inter alia, that whether or not the ELC has jurisdiction in a given matter depends on the *dominant issue* in the litigation.

87. We are not persuaded by the petitioner's argument that merely because it pleaded violations of various constitutional rights, the petition should be heard by the High Court. We find that the alleged violations are intertwined with the dominant issue. From a plain reading of section 13 (3) and (7) of the **ELC Act** and section 12 (3) of the **Employment and Labour Relations Court Act** (ELRC) the two courts have jurisdiction to deal with claims of violations of constitutional rights. See ***International Centre for Insects Physiology and Ecology (ICIPE) v Nancy Mcnally*** Civil Appeal No. 42 of 2017 [2018] eKLR, the Court of Appeal held:

> ***"****[27]* ***There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIU) vs Attorney General [2012] eKLR which was upheld by this Court in Daniel N. Mugendi vs Kenyatta University & 3 Others [2013]* eKLR. *We are not in doubt too, that the relationship between the appellant and the respondent was not a private matter between the two parties but a public activity intrinsically connected to the operations of the appellant."***

88. In ***Judicial Service Commission v Gladys Boss Shollei & another***, Civil Appeal No. 50 of 2014 [2014] eKLR, *Okwengu J.A*. held:

> ***"****[40]* ***Article 23(1) & Article 165(3) (b) of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, Article 23(2) provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, Article 23(3) does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers "a court" to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is Article 20(3) that places an obligation on "any court" in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts.***
>
> *[41]* ***Under Article 162(2) (a), the Constitution has provided for special Courts with the "status" of the High Court to determine employment and labour relations disputes. The fact that the Industrial Court has been given the "status" of the High Court enhances the power and discretion of the Court in granting relief…. the general power provided to the Industrial Court under Section 12(3) (viii) of the Industrial Court Act to grant relief as may be appropriate, read together with Article 23(3), empowers the Industrial Court to grant the kind of reliefs that the respondent sought in her petition."***

89. In the end we find and hold that the dominant issue in the petition is the right to renewal of leases over the suit land. We further find that the issue is intrinsically connected to the use and title to land. The dispute thus falls squarely within the purview of the ELC under ***Article 162 (2)*** of the **Constitution** as read with section 13 of the **ELC Act**. We also find that although the petitioner claims violation of various constitutional rights, those claims are intertwined with the dominant issue and that the ELC has jurisdiction to deal with the alleged violations.

90. The upshot is that the High Court lacks jurisdiction to entertain this petition. We accordingly order that the petition dated 18th September 2015 be and is hereby struck out. Costs ordinarily follow the event and are at the discretion of the court. We order that each party shall bear

its own costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 20th day of September 2019.

KANYI KIMONDO

JUDGE

E. C. MWITA

JUDGE

W. A. OKWANY

JUDGE

Judgment read in open court in the presence of-

Mr.Thuo holding brief for Mr.Regeru for the petitioner instructed by Regeru & Company Advocates.

Mr.Githumbi, Mr. Mola and Mr. Ng'ang'a for the 1st respondent instructed by Mbugua Ng'ang'a & Company Advocates.

No appearance by counsel for 2nd respondent instructed by the Hon. Attorney General.

Mr.Moses, Mr. Lekaram and Ms. Hellen Court Clerks.