



**Kibii (Suing as the Legal Representative of the Estate of the Late Kibii Boiyo) v Agricultural Development Corporation & others; Ethics and Anti-Corruption Commission & another (Interested Parties) (Environment & Land Petition E001 of 2023) [2025] KEELC 3667 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3667 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND PETITION E001 OF 2023**

**FO NYAGAKA, J  
APRIL 28, 2025**

**BETWEEN**

**DANIEL KIBET KIBII ..... PETITIONER  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE  
KIBII BOIYO**

**AND**

**AGRICULTURAL DEVELOPMENT CORPORATION &  
OTHERS ..... RESPONDENT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY  
NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**RULING**

1. During the pendency of this Petition the Petitioner changed his Advocates and then moved this court on 25<sup>th</sup> November 2024 through a notice of motion detected the same date. He brought it under Certificate of Urgency. He cited Articles 22, 23, 47, 48, 51, 159, 231(1) and 259 of *the Constitution* of Kenya, Sections 13 and 19 of the *Environment and Land Court Act* 2011, Order 16 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules 2010, the Inherent Jurisdiction of the court and all other enabling provisions of the law. He sought the following orders:-

1. ... Spent.
2. ... Spent.



3. This honorable Court be pleased to issue a conservatory barring (sic) the 1<sup>st</sup> Interested Party herein and/ or their agents, employees, staff and anyone howsoever acting on their instructions from further investigating into summoning, arresting, confining, detaining, interfering with the petitioner herein, charging or prosecuting the petitioner or any other person in connection with the property known as LR. No. 5335/23 and LR 4140/4 situated in Trans Nzoia County pending the hearing and determination of the petition.
  4. That this honorable court be pleased to issue summons to Mr. Charles Rasugu to attend court for cross-examination on the contents of the intent and purpose of inviting the petitioner herein for purposes of interview and statement recording as per the letter dated 11th November 2024.
  5. That this honourable Court do find and declare that the actions of Mr. Charles Rasugu are contemptuous and then impose upon him a jail term of six (6) months.
  6. That this honourable Court do find and declare that Mr. Charles Rasugu is unfit to hold public office for interfering with court proceedings.
  7. That this honourable Court be pleased to issue any other order it deems fit to grant.
  8. The cost of this application be in the course (sic).
2. The application was based on a number of grounds totaling sixteen (16). They were that the matter was pending before this Court and had a hearing date on the 11th December 2024. On 11th November 2024, the 1<sup>st</sup> Interested Party issued to the Petitioner an Invitation for Interview and Statement recording yet it knew well that the issue of ownership of the subject properties was pending before the Court. The invitation for Interview and Statement Recording was in relation to parcel numbers L.R. No. 5335/23 and L.R. No. 4140/4. The interview was scheduled for 27th November 2024. The actions of the 1<sup>st</sup> Interested Party demonstrated that it was intended to frustrate the just determination of the issues before this Court.
  3. On 25th September 2024 the 1<sup>st</sup> Interested Party applied for and obtained Search Warrants against the Petitioner in Milimani Anti-Corruption Court, Miscellaneous Application No. E1129 of 2024 (EACC vs. Daniel Kibet Bii). They were for the purpose of conducting a search for any documents in his possession in relation to the suit parcels of land. Following the search, there was an inventory of documents recovered by the 1st Interested Party from the Petitioner's custody, which they alleged were under investigation. The inventory did not relate to the suit property. He alleged further that his continued harassment by the Interested Party was intended to serve an unknown purpose.
  4. Further, the letter dated 27th November 2024 was aimed at harassing, intimidating and forcing the Petitioner to withdraw the Petition from Court and irregularly terminate the current proceedings, which was highly contested. The 1<sup>st</sup> Interested Party's actions were meant to aid the party to steal a match and circumvent the exclusive jurisdiction of this court to hear and determine the matter and enable it to make an informed decision. They relied on the Supreme Court case of Cyrus Shakhange Khwa Jirongo vs. Soy Developers Limited & others, Petition No. 39 of 2019 at paragraph 77 where the Supreme Court stated that the police can only interfere in a matter after a civil court has conclusively and with the finality made a finding of fraud.
  5. Further, that it would be an absurdity in law if this Court clothed with final jurisdiction in such disputes, unless in exceptional circumstances, were to quickly declare and affirm the interest acquired the petitioner as valid while the Interested Party, out of ulterior schemes, would have already caused the petitioner's arraignment, prosecution and or possible conviction on tramped up charges through



targeted abuse of the criminal justice system. He added that the 1<sup>st</sup> Interested Party's had filed an application dated 23rd October 2024 in this Court seeking to file a Supplementary Affidavit and additional documents and statements. Therefore, all issues in relation to the subject matter could be heard and determined by this Court. There was a likelihood that the 1<sup>st</sup> Interested Party would hastily cause the arrest, incarceration and prosecution of the Applicant based anchored on evidently biased and skewed investigations without regard to the due process and his constitutional right under Article 50 of *the Constitution*. He contended that unless the Court intervened, the Petitioner would suffer irreparable and irreversible loss and damage based on skewed and predetermined malicious investigations and possible prosecution which are contrived to circumvent the civil jurisdiction of this court.

6. The instant application had been filed without undue delay and in good faith to safeguard the rights and fundamental freedoms of the Petitioner which were being violated and threatened with violation. He summed it that no prejudice would be suffered by the Respondents and Interested Parties if the orders sought were granted. It was just and fair, expedient the application he heard.
7. The application was supported by the Affidavit of Daniel Kibet Bii who repeated the contents of the grounds in support of the Application in deposition form. He added annexures to the Affidavit which he swore on 25th November 2024. The first annexure was marked DKK1, being the copy of the Invitation Letter for interview and statement recording on 27th November 2021. The second one was marked DKK 2. It was a copy of the warrant of search issued in Miscellaneous Application No. 119 of 2024. The 3<sup>rd</sup> annexure was DKK 3 being a copy of the Inventory made by the 1<sup>st</sup> Interested Party upon carrying out the search. Annexure DKK4 was a copy of the Application made by the 1st Interested Party seeking leave to a Further List of Documents.
8. The first respondent. Filed A Replying Affidavit sworn on 2nd December 2024. It was sworn by one, Edward Ojode. He stated that the Orders issued by the court in Milimani Civil Application No. E1129 of 2024 had already been executed. The impugned order was neither reviewed nor appealed against hence, the Applicant could not seek a redress from this court which was not the right forum for litigation over the issues raised.
9. Further, the issues raised by the applicant fell within the constitutional mandate of the 1<sup>st</sup> Interested Party. Article 159 of *the Constitution* of Kenya mandated this Court to determine the right of ownership regarding the suit property in dispute, and as pleaded by the Petitioner, Chapter 6 of *the Constitution* as read with Section 11(1)(d) of the Ethics and Anti-Corruption Commission mandated the 1<sup>st</sup> Interested Party to investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or anybody or economic crimes in violation of codes of ethics as prescribed and the Act that might have been committed in the process of acquiring any of the disputed documents. Further, by virtue of Section 35 of the *Anti-corruption and Economic Crimes Act* No. 3 of 2003 as read with Section 11(1)(d) of the same Act the Interested Party was mandated to receive evidence and report to the Director of Public Prosecution about the evidence received on whether the Petitioner used the rightful process to acquire the documents in relation to the land in question.
10. In the instant Petition the applicant should honor the 1<sup>st</sup> Interested Parties' Invitation for Interview and Statement Recording to give an account of how the Estate of the late Kibii Boiyo acquired the said titles. Lastly, the Applicant was not a party to the said Milimani Miscellaneous Civil Application No. E1129 of 2024. Therefore, he should appear before the Interested Party for interview and investigation since the 1<sup>st</sup> Interested Party was exercising its constitutional mandate.
11. The second Interested Party also filed a reply to the application. He stated that he was an employee of the Ethics and Anti-Corruption Commission (EACC). He stated that the EACC was established



under Section 23 of the [Anti-Corruption and Economic Crimes Act](#). Further, the body was mandated or empowered by law to investigate any activities such as the Petitioner's.

12. The Petitioner filed two other Supplementary Affidavits. One was sworn on 5th December 2024. In it he deposed that the Petition No. E064 of 2024 (Benson Limo vs. DCI & 2 Others), the order granted by Hon. Bahati Mwamuye on 19<sup>th</sup> November, 2024 and OB dated 24/11/2024 made at Nairobi West Police Station, were made pursuant to the leave granted by the Court on 06/12/2024. He annexed copies of the same and marked them as annexures.
13. He also swore another Supplementary Affidavit on 13<sup>th</sup> December 2024. He deposed in it that the purpose of the application was to have the status quo maintained or protected and not to stop (sic) any investigations or recommendations for prosecution whatsoever. Further, that he sought orders to stop the 2<sup>nd</sup> Interested Party from repossessing the title of the suit land since it was part of the evidence he would present to the Court at the hearing of the Petition. That he sought the maintenance of the status quo because it was material in relation to the subject matter. The actions of the 2<sup>nd</sup> Interested Party in conducting concurrent hearing with that of this Court violated the constitutional right to fair trial as provided for under Article 50 of [the Constitution](#) given that the 2<sup>nd</sup> Interested Party was already a party which had already filed a List of Documents and a statement hence should present itself to the jurisdiction of the Court.
14. Further, the Court had unfettered jurisdiction under Article 159(2)(d) to hear the Petition without undue technicalities and administer justice. That a party who has no respect to the rule of law, fairness and integrity should not be permitted to gain an advantage over other parties. This Court should make a choice as to whether the hearing of the suit would be conducted before this Court or the EACC. That if the court did not intervene, the actions of the 2<sup>nd</sup> Interested Party would compromise the substratum of the instant matter and cause a miscarriage of justice.
15. The 2<sup>nd</sup> to 4<sup>th</sup> the Respondent filed a Preliminary Objection dated 3<sup>rd</sup> December 2024. It raised 3 grounds with one being that the application was a non-starter, mischievous frivolous and devoid of merits. The second one was that this court did not have jurisdiction to entertain the application. The third one was that the Court did not have jurisdiction to supervise the first Interested Party' in exercise of its mandate.
16. Following that, the parties filed written submissions, both on the Application and the Preliminary Objection. The 1<sup>st</sup> Respondent filed its submissions dated 16<sup>th</sup> December 2024. It also filed its other Submissions on the Preliminary Objection. They were dated 17<sup>th</sup> December 2024. The second Interested Party filed its List of Authorities dated 16<sup>th</sup> December 2024. The 2<sup>nd</sup> Interested Party filed its submissions on the Preliminary Objection. They were dated 17<sup>th</sup> December 2024. The 2<sup>nd</sup> Interested Party filed its List of authorities dated 16<sup>th</sup> December 2024. The Petitioner filed its List of authorities dated 16<sup>th</sup> December 2024 on the application.
17. This Court has considered the law, the pleadings of the parties, particularly the application and the response thereto since that is the document in issue. It has also analyzed the submissions of by all the rival parties. It is of the view that there are only three issues that it should determine. The first one is whether the application is frivolous and mischievous. The second one is whether this Court has jurisdiction to hear and determine the instant matter. The third one is who to bear the costs of the application.



18. This Court will start by defining what amounts to a preliminary objection. In the case of Mukhisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696, Sir Charles Newbold defined a Preliminary objection as follows:

“ A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

19. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] e KLR, the same Court held that,

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

20. Also, in *Susan Wairimu Ndiangui V Pauline W. Thuo & another* [2005] eKLR, Musinga J as he then was held as follows:-

“a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

21. From the above decisions it is clear that a preliminary objection does not require the court to look at the facts of any claim. It obliges it to examine the pleadings only and compare them with the law.

22. In the instant matter this Court has been called upon to make a finding that the instant Notice of Motion dated 25<sup>th</sup> November, 2025 of a non-starter, mischievous and frivolous. For the court to determine such a point it ought to look at the facts of the application and weigh them against the prevailing law. Thus, the point raised is not a pure point of law. It fails.

23. The next point is that this Court has no jurisdiction to determine the application. It lacks the same due to the criminal nature of the investigations that are said to be on-going by the 1<sup>st</sup> Interested Party touching on the Estate of the late Kibet Boiyo. The 2<sup>nd</sup> – 4<sup>th</sup> Respondents argue that his Court has no jurisdiction to supervise the EACC in its conduct of the investigations arising from its mandate.

24. In the locus classicus of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989)* the Court of Appeal held that:-

“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...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

25. These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

26. It is not in contention that on the one hand the jurisdiction of this Court is established under Article 162(2)(b) of *the Constitution* of Kenya and Section 13 of the Environment and Land Court (ELC) Act. Its mandate is clearly in relation to land and environment matters. Outside of the above, the Court only exercises quasi-criminal jurisdiction when its orders are disobeyed, in cases of contempt of court.
27. On the other hand, Article 165(3) provides that, “Subject to clause (5), the High Court shall have - (a) unlimited original jurisdiction in criminal and civil matters;” Also, Article 165(6) provides that 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.”
28. It means that this Court does not have jurisdiction to determine issues of a criminal nature, including the process leading to the institution of such matters in courts. This includes a determination as to whether the process is constitutional or otherwise. Only the High Court is the one constitutionally mandated to do so.
29. In *Jirongo v Soy Developers Ltd & 9 others* (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment), the Supreme Court of Kenya held:

“We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned Judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then section 193A of the *Criminal Procedure Code* cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book. In addition, we shall, later in this Judgment,



express ourselves on the criteria to be used by the High Court before terminating any criminal prosecution.”

30. Having carefully considered the Preliminary Objection I find it merited. From such a finding, it is clear that this Court does not have the jurisdiction to supervise processes that lead to the institution of criminal charges against any parties, whether such processes are begun by the 2<sup>nd</sup> Interested Party or any other. I dismiss the application dated 25<sup>th</sup> November 2025 with costs to the parties which supported the Objection.
31. The Court shall deliver the related application relating to the filing of additional documents on 4<sup>th</sup> June 2025.

**RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 28<sup>TH</sup> APRIL, 2025.**

**HON. DR. IUR F. NYAGAKA,  
JUDGE**

