



**Lariak Properties Limited v Metro Pharmaceuticals Limited (Environment & Land  
Miscellaneous Case E19 of 2022) [2022] KEELC 15000 (KLR) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15000 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E19 OF 2022  
OA ANGOTE, J  
NOVEMBER 25, 2022**

**BETWEEN**

**LARIAK PROPERTIES LIMITED ..... APPLICANT**

**AND**

**METRO PHARMACEUTICALS LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. This Ruling is in respect of the Preliminary Objections dated November 16, 2022 and November 17, 2022. The objection of November 16, 2022 filed at the behest of the Auctioneer, Mr Zacharia Baraza T/A Siuma Auctioneers, is premised on the grounds that;
  - i. That this Honourable Court has no jurisdiction to handle this matter *ab initio* that is from November 8, 2022 onwards to date.
  - ii. That this Honourable Court had no jurisdiction to call up for this matter and court's file from the subordinate Court to itself as it purported to do suo moto non partes on the November 8, 2022 or thereabouts.
  - iii. That this Honourable Court has no supervisory jurisdiction over the subordinate Courts, Tribunals and other Quasi-judicial tribunals handling matters within its jurisdiction, that is environment and land disputes.
  - iv. That Article 162 of the *Constitution* enjoined parliament to establish *inter-alia*, courts to hear and determine disputes relating to the environment and the use, occupation of, and title to land.
  - v. That Article 162(3) enjoins parliament to establish to determine the jurisdiction and functions of the ELC.



- vi. That pursuant to and in operationalization of Article 162(2) and (3) of the Constitution, Parliament enacted the Environment and Land Court Act to not only provide for the Environment and Land Court but specifically provide for the jurisdiction of the said Court in Section 13 thereof which originally specifically provided for and conferred supervisory jurisdiction over subordinate courts et al but the said supervisory jurisdiction was withdrawn and deliberately taken away by the same parliament via amendments to the Environment and Land Court Act which deliberately and expressly meant that henceforth, the Environment and Land Court ceased to have any supervisory jurisdiction over subordinate courts et al.
- vii. That this Honourable Court purported to arrogate unto itself supervisory jurisdiction under Section 3 and 18(1)(b) of the Civil Procedure Act yet the said provisions do not provide for and confer jurisdiction to ELC as they are not the statutory provisions for operationalizing Article 162(3) of the Constitution on conferment of jurisdiction to ELC.
- viii. That jurisdiction is conferred not inferred; it is donated, not implied.
- ix. That the Auctioneer was cited for contempt and convicted without there being in place any contempt proceedings nor Applicant for Contempt proceedings yet these are not contempt in the face of the Court matters.
- x. That the Auctioneer was cited for contempt without having been served with the Court order he is alleged to have disobeyed nor served with the mandatory disclaimer and penal notice warning him of the penal consequences in the event of any alleged disobedience of the Court order.
- xi. That the order in issue was not directed at the Auctioneer; it was actually directed at the Defendant/Respondent and any interpretation in the contrary would lead to ambiguity and diametrical contradiction of pranks(i) and (ii) of the order.
- xii. That granted there are no contempt on the face of the Court under consideration, the only Court with jurisdiction to handle any alleged contempt of the order would be the Court that issued the same that is Hon HM Nganga (MR) as the Principal Magistrate as per Order 40 Rule 3 of the CPR that is "...the Court granting the jurisdiction"; indeed under the Magistrates Act read together with Order 40 Rule 3 of the CPR, only the Magistrate Court that issued the order has the Original jurisdiction to handle contempt proceedings.
- xiii. That the jurisprudential precepts and imperatives for contempt proceedings were not met nor canvassed at all.
- xiv. That in any event, the Auctioneer was condemned unheard there being no formal contempt proceedings in place to accord the Auctioneer sufficient and reasonable opportunity to be heard and impose the jurisprudential obligation on the Respondent to prove to the required standard or just below beyond reasonable doubt the;



- a. Existence of a Valid Court Order from a Court of Competent jurisdiction
- b. That the order was clear and unambiguous
- c. Personal service of the order with penal notice endorsed on it upon the auctioneer,
- d. Willful disobedience of the Court order.

2. Vide the Objection of November 17, 2022, the Applicant contends as follows:

- i. That this Court lacks jurisdiction to exercise supervisory jurisdiction as the Court is an Environment and Land Court that is established under Article 162(2)(b) of the [Constitution of Kenya, 2010](#) while the [Constitution](#) only grants supervisory jurisdiction to the High Court as established under Article 165 of the [Constitution of Kenya, 2010](#).
- ii. That the Supervisory jurisdiction is only granted to the High Court as established under Article 165(6) of the [Constitution of Kenya, 2010](#) and therefore it cannot apply to the Environment and Land Court as the said Court is established under Article 162 of the [Constitution of Kenya, 2010](#).
- iii. That it is already settled that the Environment and Land Court together with the Employment and Labour relations Courts are different from the High Court.
- iv. That it is already settled that jurisdiction is everything and the same must flow from the [Constitution of Kenya](#) or any other statute therefore any actions by a court devoid of jurisdiction is null and void.
- v. That Section 18(1)(b) of the [Civil Procedure Act](#) as invoked by this Honourable Court is only available to the High Court as envisaged under Article 165 of the [Constitution of Kenya, 2010](#).
- vi. That it is already settled that matters jurisdiction of the Court can be raised at any particular time within the trial process and whenever an issue of jurisdiction is raised, the Court must first and foremost deal with it first.
- vii. That in the foregoing, mitigation can only be dealt with after the Court has dealt with the issue of jurisdiction and established whether it has proper jurisdiction.
- viii. That Article 50 of the [Constitution of Kenya, 2010](#) provides for the rights to a fair hearing which is construed to mean the right to be heard in the proper forum and this goes to the root of the trial as the trial court must have jurisdiction to conduct the said hearing.
- ix. That the issue of jurisdiction as raised herein is core as it does not only challenge the jurisdiction of this Honourable Court but also challenges the jurisdiction of the specialized courts that include the Environment and Land Court and the Employment and Labour relations Court were established under Article 162 of the [Constitution of Kenya, 2010](#).



## Submissions

3. The Preliminary Objections were canvassed both orally and via written submissions. Counsel for the auctioneer and the Applicant submitted that this Court was created by Article 162 (2) (b) of the Constitution as a Court with the same status as the High Court and that the Court has no supervisory jurisdiction when it comes to subordinate courts.
4. It was submitted that the Constitution under Article 162 (2)(b) granted Parliament the authority to establish the Environment and Land Court; that whereas the High Court is a creature of the Constitution, this Court was created by an Act of Parliament and that the equal status of the Court stipulated under Article 162 of the Constitution is not the same as that of the High Court.
5. It was submitted that this Court's powers of supervisory jurisdiction initially granted by Section 13(5) of the Environment and Land Court Act were taken away by Parliament; that this Court's appellate jurisdiction is separate from the supervisory jurisdiction of the Court and that the Court does not have powers to call for a file from the lower Court even assuming that Section 18(1) (b) of the Civil Procedure Act was applicable.
6. The Applicant and the Auctioneer's counsel submitted that Order 40 Rule (3) of the Civil Procedure Rules is clear that it is only the Court that grants an injunction that can punish for its contempt; that this Court is not seized with jurisdiction, did not issue any order and as such cannot purport to hold the Auctioneer in contempt and that any aggrieved party should have approached the Court that issued the orders.
7. It was submitted that Article 10 (2) of the Constitution provides for non-discrimination; that if there is a process which has been breached, the same should be dealt with in a fair forum where the matter was heard pursuant to Article 25 of the Constitution and that the Applicant who was affected by the orders had no knowledge of them.
8. It was submitted that that jurisdiction is everything and that the same is conferred and not inferred; that under Section 13 of the ELC Act, 2011, the Court was initially granted supervisory jurisdiction but the same was taken away vide the amendments to the Act in 2012 and that this position was affirmed by a five Court bench in Patrick Musimba vs National Land Commission & 4 Others [2015] eKLR.
9. It was submitted that Section 18 (1) (b) of the Civil Procedure Act refers to the High Court and the supervisory powers thereon cannot be extended by implication to apply to the Environment and Land Court considering that Parliament deliberately took it away and that a court cannot arrogate itself jurisdiction through the craft of interpretation. Both counsel relied on numerous authorities which I have considered.

## Analysis and Determination

10. Having analyzed the pleadings and submissions by the parties, the issues that arise for determination are;
  - i. Whether the Preliminary Objections are competent and if so?
  - ii. Whether the Preliminary Objections are merited?



11. The threshold of a preliminary objection was set out by the Court of Appeal in the *locus classicus* case of *Mukhisa Biscuits Manufacturing Co Limited vs West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that;

“...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.”
12. Newbold, P further held as follows:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”
13. The Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others*, Petition No 10 of 2013, [2014] eKLR re-affirmed the principle as set out in the *Mukhisa* Case stating 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”
14. The Applicants' have objected to the jurisdiction of this court. As stated by the Supreme Court in *Hassan Ali Joho* case (*supra*) and reaffirmed by the same Court in *Dysara Investment Limited & 2 others vs Woburn Estate Limited & 5 others* [2020] eKLR, an objection to the Court's jurisdiction is a Preliminary objection.
15. Indeed, as correctly submitted by the Applicants, jurisdiction is everything. The exposition by Nyarangi, JA in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 restated the importance of the court's jurisdiction as follows;

“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...”
16. The Applicants assert, and strongly so, that this Court does not have supervisory jurisdiction over subordinate courts and as such, should not have purported to call a file from the subordinate court and issue the orders as it did. It is their position that this supervisory power, having been deliberately taken away by Parliament vide the *Statute (Miscellaneous) Amendment Act, 2012* and is not available to the Court and the Court cannot seek refuge in section 18 (1) (b) of the *Civil Procedure Act*.



17. They further argue that whereas the High Court is a creature of the Constitution, this Court was established by an Act of Parliament, and that its jurisdiction flows from the said Act and not the Constitution or the Civil Procedure Act.
18. In discussing the issue of the jurisdiction of the Environment and Land Court, and to contextualize the Applicants' objection, it is necessary for me to venture into a brief discourse on the establishment and mandate of the Environment and Land Court.
19. The Environment and Land Court is one of the salient creations of the Constitution of Kenya, 2010. Article 162 (2) of the Constitution mandated Parliament to establish courts of equal status to that of the High Court to deal with disputes relating to employment and labour; and environment and the use, occupation of and title to land. Article 162 of the Constitution provides as follows;
- "(1) The Superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in Clause 2.
  - (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to
    - a) employment and labour relations; and
    - b) the environment and the use and occupation of, and title to land.
  3. Parliament shall determine the jurisdiction of the Courts contemplated under Clause 2."
20. It is pursuant to this constitutional imperative that Parliament enacted the Environment and Land Court Act, 2011 and provided for the expanded jurisdiction. As already stated, the Constitution at Article 162(1) provides that the superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in Clause 2.
21. It is therefore clear from the aforesaid provision of the Constitution that this court, just like the other four superior courts, is not only a creature of a statute, but also a creature of the Constitution. Indeed, in addition to the Environment and Land Court Act, the Constitution itself confers on the ELC the jurisdiction to determine disputes relating to the environment and the use and occupation of, and title to land. This position was affirmed by the Court of Appeal in Chimweli Jangaa Mangale & 3 others vs Hamisi Mohamed Mwawasaa & 15 others, [2016] eKLR which observed as follows;
- "The Constitution has therefore created a specific court, with equal status to the High Court and conferred on it the jurisdiction to hear and determine disputes relating to, among others, use, occupation, title to land and "any other dispute relating to land."
22. Indeed, not only were the two specialized courts created by the Constitution, they were created as courts of equal status to the High Court. In Chimweli Jangaa Mangale (supra), the Court of Appeal held as follows:
- "Article 165 (5) of the Constitution provides in express terms that the High Court shall not have jurisdiction over matters falling within the jurisdiction of the Environment and Land Court. Again, by dint of Article 165 (6) of the Constitution, the supervisory jurisdiction of the High Court does not extend to the ELC, which is a superior court like the High Court."



23. The position that the Environment and Land Court has the same status as the High Court was explained by the Supreme Court in *Republic vs Karisa Chengo & 2 others* [2017] eKLR as follows:

“In addressing the latter historical controversy, the Committee of Experts reinstated the provision allowing Parliament to establish, by legislation, employment and land/environment Courts with a status equivalent to the High Court as had been provided for in the earlier drafts of the Constitution including the 2005 Referendum draft by the Constitution of Kenya Review Commission (CKRC). [48] 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 and the ELRC as covering matters of employment and labour relations 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.”

24. The Court further stated as follows;

“... 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. In their words:

“By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word ‘status’. The intentions of the framers of the Constitution in that regard are obvious given the choice of words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”

25. The key words in the *Karisa Chego* case (*supra*) are that the Environment and Land Court exercises the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction.



26. On August 30, 2011, Parliament established the [Environment and Land Court Act, 2011](#). Section 13 thereof set out the jurisdiction of the Court which initially included its supervisory mandate at Section 13 (5) as follows;

“The Court shall have supervisory jurisdiction over the subordinate Courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution”

27. On July 6, 2012, the [Statute Law \(Miscellaneous Amendments\) Act, 2012](#), received Presidential assent. Under the Act, several laws were amended including the [Environment and Land Court Act](#) relevant of which was the deletion of Section 13(5) which granted this Court supervisory powers.

28. It is not lost on the Court, and the Court does indeed take judicial notice of the fact that several provisions of the above-mentioned [Statute Law \(Miscellaneous Amendments\) Act](#) No 12 of 2012 have been declared unconstitutional by the Courts. The Court in [Mercy Munee Kingoo & Another vs Safaricom Limited & another](#) [2016] eKLR found the amendments to Section 30A of the [Copyrights Act](#), to be unconstitutional holding that not only was there no evidence that the stakeholders were engaged before the introduction of the said section, but the amendment was not minor. The court posited:

“Ordinarily, a Statute Law (Miscellaneous Amendments) Act would only deal with minor amendments to certain statutes. Such amendments involve rectification of drafting mistakes or deleting provisions which have been affected by other new legislation among others. There would be no need for extensive public participation if the intention is to do minor amendments as the same Act suggests.

However, where the new introductions alter the original Act to a great extent and introduces new substantive provisions that were not in place before, then such amendments ought to be subjected to public participation”

29. The same fate befell the Amendments to the [Law Society of Kenya Act](#) through the same [Statute Law \(Miscellaneous Amendments\) Act](#) No 12 of 2012 which were found to be unconstitutional by the Court of Appeal in [Law Society of Kenya vs the Attorney General & 2 others](#) eKLR 2019. The Appellate Court struck down the challenged amendments and held that the Legislature overreached in passing substantive amendments in un-procedural and non-participatory manner.

30. The legitimacy of the [Statute Law \(Miscellaneous Amendment\) Act 2012](#) which amended the [ELC Act](#) by deleting section 13 (5) of the Act which provided for the court’s supervisory role has thus been impugned by multiple courts, including the Court of Appeal. This is based on the fact that it made substantive changes to the laws without the input of stakeholders.

31. Back to the matter at hand, the foundation of the Applicants' objection is the deletion of section 13 (5) from the [ELC Act](#) which provided for the supervisory jurisdiction of the court so what is “supervisory jurisdiction?”

32. The [Blacks law dictionary](#), 11th Ed, defines supervisory control as;

“The Control exercised by a higher authority over a lower court, as by prohibiting the lower court from acting extra jurisdictionally and by reversing its extra jurisdictional acts.”



33. In *Gallagher vs Gallagher*, 212 So 2d 281,283(La Ct App 1968), the court defined supervisory jurisdiction as;

“Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs.”

34. The question that arises from this definition is whether a superior court such as the Environment and Land Court can exist without supervisory power over the subordinate courts and tribunals dealing with environment and land matters because the law does not expressly provide so.

35. It has been submitted by the Applicants that it is only the High Court, pursuant to Article 165 (6) of the *Constitution* that has the mandate to exercise supervisory jurisdiction over the subordinate courts, and that pursuant to Article 165 (7), has the authority to call for the record of any proceedings before any subordinate court, 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.

36. Article 165 of the *Constitution* lays down the general jurisdiction of the High Court. Article 165 (5) of the *Constitution* provides that the High Court shall not have jurisdiction in respect to matters falling within the jurisdiction contemplated in Article 162 (2).

37. As succinctly espoused by Majanja J in *United States International University vs Attorney General* Nairobi Petition No 170 of 2012(eKLR), the jurisdiction bestowed upon the High Court under Article 165 (3) is not absolute but ‘subject to clause (5)’ whose provisions forbid the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the specialized courts established under Article 162(2).

38. In the *United States International University* case (supra), the court observed that the jurisdiction of the specialized Courts is to be determined from a textual consideration of the provisions governing the judicature. The court observed that the High Court cannot exercise jurisdiction in matters reserved for courts of equal status contemplated under Article 162(2) of the *Constitution*.

39. Article 259 of the *Constitution* demands that the *Constitution* should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance. It also demands that every provision of the Constitution “shall be construed according to the doctrine of interpretation that the law is always speaking.”

40. *In Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR, the Supreme Court of Kenya affirmed that the Constitution must be “purposively interpreted” stating;

“The Attorney-General’s contention, in our view, bears a particular perception of the meaning of constitutional interpretation. To enable us to clarify the matter, we have taken cognizance of relevant persuasive authority. In the Namibian case, *S v Acheson*, 1991 (2) SA 805 the following passage (Mahomed, AJ) appears (at p 813):

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and ....aspirations of a nation; the articulation of the values bonding its people and disciplining its government.



The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion. Subsequently, the Namibian Supreme Court, in *Minister of Defence, Namibia – vs – Mwandighi*, 1992(2) SA 355 (at p 362) thus held: “The Namibian Constitution must therefore be purposively interpreted, to avoid the ‘austerity of tabulated legalism.’ We would adopt the same principle, as to the spirit of the Constitution lying at the core of all constitutional interpretation.”

41. As a superior Court, this Court has appellate jurisdiction over the Magistrates who have been gazetted to handle land matters as well as multiple Tribunals including the National Environment Tribunal, the Business Premises and Rents Tribunal, Water Tribunal and the Cooperatives Tribunal.
42. Taking into account the Applicants’ arguments, are we then to say that when these subordinate courts and Tribunals, which are answerable to the ELC on appeal, step outside their mandate, it is the High Court that has the jurisdiction by dint of Article 165 (6) and (7) of the *Constitution* to intervene? From the exposition in the *USIU* case and the provision of Article 165 (5) of the *Constitution*, the answer is a resounding no! What then becomes of these Courts and Tribunals? Are they left unchecked?
43. It is to be noted that this Court exercises judicial review jurisdiction in matters pertaining to environment and land, through which the Court essentially supervises the proceedings and decisions of the lower Courts, Tribunals and other bodies that perform public functions. As espoused by Michael Fordham QC in his book *Judicial Review Handbook* 5<sup>th</sup> Ed.

“Judicial Review is a central control mechanism of administrative law (public law) by which the judiciary take the historic constitutional responsibility of protecting against abuses of power by public authorities. It is an important safeguard which promotes the public interest, assists public bodies to act lawfully and ensures that they are not above the law, and protects the rights and interests of those affected by the exercise of public authority power?”

44. As expressed by the Court in *Republic vs Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another* (2014) eKLR;

“Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of the decision.”

45. If we are to take the position that this Court does not have supervisory jurisdiction over the subordinate courts and tribunals, it will essentially mean that the court is bereft of judicial review jurisdiction, which is far from the truth.
46. This Court has had the occasion to address the question with respect to its supervisory powers. In *Joyce Mutindi Muthama & another vs Josephat Kyololo Wambua & 2 others* [2018] eKLR, this Court sitting in Machakos held as follows;

“If the court has the jurisdiction to exercise appellate jurisdiction over the decisions of subordinate courts and tribunals, and considering that the court has the same constitutional status as the High Court, it follows that the court has a supervisory role over such subordinate courts and tribunals. It does not matter that the law does not expressly state so, or that the provision of the law stating that the court has such a supervisory role was deleted by Act No 12 of 2012.”



47. Similarly, in *National Social Security Fund vs Sokomania Ltd & another* [2021] eKLR Okongo J, in considering whether the Environment and Land Court exercises supervisory power over subordinate courts, opined as follows:

“It is common ground that this court has supervisory jurisdiction over the Magistrate’s Court in respect of matters falling within its jurisdiction. I am of the view that this court would be abetting an injustice against the Applicant and undermining proper administration of justice if it fails to intervene in this matter.”

48. Having laid out the foundation of this Court as established by the Constitution as a Court of equal status to the High Court, it would be absurd and indeed illogical to conclude that this Court does not have supervisory jurisdiction. As expressed by the Court in *Center for Rights Education and Awareness & Another vs John Harun Mwau & 6 others* [2012] eKLR,

“There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise.”

49. The Applicants have referred the Court to several cases, key of which is the *Patrick Musimba Case (supra)* which the Court has considered. In that case, the High Court considered whether in light of the amendments to the *ELC Act*, Parliament took away the Courts jurisdiction to determine matters of a constitutional nature involving environment and land generally. The Court stated;

“In view of the 2012 amendments to the ELC Act one would be tempted to conclude that on a true construction of section 13 (3) of the ELC Act the jurisdiction of the ELC in so far as enforcement of constitutional rights was concerned, was limited and restricted by Parliament to matters relating to a clean and healthy environment under Articles 42, 69 and 70 and not environment and land generally under Article 40 of the Constitution. The Court of Appeal’s decision in Mugendi as read together with Section 13 of the ELC Act however lead to the plausible conclusion that the ELC has jurisdiction to determine matters of a constitutional nature as well. We also say so as 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.”

50. While it is apparent that the High Court in *Patrick Musimba case (supra)* was not dealing with and therefore did not interrogate the question of this Court’s supervisory role, the Court appreciated the need for a holistic interpretation of the Constitution in light of the Court’s jurisdiction.

51. Indeed, the High Court in the *Patric Musimba case* did not state that the ELC does not have supervisory role over the subordinate courts. Rather, the court frowned upon the adoption of a



separationalistic view or approach and the splitting of issues between the Courts where a court is properly seized with a matter, which is the very act that the Applicants are doing.

52. The Constitution having granted this court the status of the High Court in matters relating to Environment and land, and without resorting to tabulated legalism, it follows that powers of the High Court to supervise subordinate courts under them applies mutatis mutandis to this court, but limited to environment and land disputes.
53. In conclusion, it is the finding of this court that supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. The supervisory power over the lower courts by the superior courts is a sui generis jurisdiction accorded to superior courts through which they keep checks on subordinate courts and tribunals.
54. Considering that the High Court cannot superintend over subordinate courts gazetted under the *Environment and Land Court Act* to handle environment and land disputes, and the Environment and Land Court being of the same status as the High Court, it follows that the Court has supervisory jurisdiction over those courts, notwithstanding that the *Environment and Land Court Act* does not expressly state so.
55. In the end, it is the finding of the Court that it is duly vested with supervisory jurisdiction.
56. The Applicants have faulted the Court for its reliance on the provisions of Sections 3 and 18 (1) (b) of the *Civil Procedure Act*, 2010. Section 3A of the Act provides that nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
57. Section 18 (1) (b) provides as follows:

“Power of High Court to withdraw and transfer case instituted in subordinate court

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage-
  - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter-
    - (i) try or dispose of the same; or
    - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
    - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.”

58. Having held that the status of this court is similar to that of the High Court, and considering that the Environment and Land Court was not in existence at the time of the commencement of the Act, it follows that “High Court” in the *Civil Procedure Act* should be interpreted to mean “Environment and Land Court” wherever the court is exercising its constitutional mandate. This is in line with Article



262 of the Constitution, Sixth Schedule, transitional and consequential provisions which provides as follows:

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

59. Taking into account the foregoing and noting the provisions of Section 19 of the Environment and Land Court Act which provides that the Court shall be bound by the procedure laid down in the Civil Procedure Act, and having found that this court has supervisory jurisdiction over subordinate courts, this court will consider whether it exercised its authority lawfully.

60. In Republic vs Chief Magistrate’s Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot, the High Court distinguished supervisory jurisdiction as against appellate jurisdiction and held that it ought to be used only in circumstances of grave miscarriage of justice:

“59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control the power is conferred on superior courts to issue the necessary and appropriate writs.{{^}}

60. This power of superintendence conferred by Article 165 (6) of the Constitution, as pointed out by Harries, CJ in *Dalmia Jain Airways Ltd v Sukumar Mukherjee*,<sup>[43]</sup> is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere.”

61. After the lower court issued the orders of injunction in MC ELC No E 361 of 2022, the nation watched in horror as the occupants in a building standing on LR No1870/111/46 in Westlands, Nairobi, were violently evicted and the house demolished on the basis of an order issued by the Principal Magistrate.

62. The newspapers and TV stations published two orders purportedly issued by the subordinate court, which orders appeared to be at variant with each other. Other than the purportedly conflicting orders, the question that arose was whether the magistrate who issued the order that was used to evict the occupants of the house and demolish the house had pecuniary jurisdiction to issue those orders in the



first place. Indeed, the issue of the pecuniary jurisdiction of the Magistrate will be determined at the appropriate time.

63. It is on that basis that this court exercised its supervisory jurisdiction on its own motion and transmitted the lower court file to the court pursuant to the provisions of the section 18 (1) (b). On November 9, 2022, the court directed the advocate who had extracted the orders of the court and the auctioneer who executed the said orders to file an Affidavit to explain the circumstances under which the order (s) by the lower court were used to evict the occupants in the suit property and the demolition of the house. This was in light of the express orders of the lower court that prohibited the Respondent from interpreting the injunction order to mean “eviction.”
64. Considering the circumstances I have enumerated above, this court is persuaded that the circumstances of the case involved severe miscarriage of justice and flagrant abuse of the principles and rule of law which required intervention and further inquiry by this court in its supervisory role of the magistrates gazetted to resolve disputes relating to land and environment.
65. The Applicants have sought to impugn the contempt proceedings herein. They contend that first, the Court had no jurisdiction to undertake the contempt proceedings herein and second, that the Auctioneer was not accorded the right to a fair hearing before being convicted for contempt
66. *Black’s Law Dictionary* (Ninth Edition) defines contempt of Court as:-  
“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
67. *Halsbury’s Law of England*, Vol 9(1) 4th Edition states as follows;  
“Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury.’ A court without contempt power is not a court. The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.”
68. Closer home, the Court in *Teachers Service Commission vs Kenya National Union of Teachers & 2 Ors*[2013] eKLR, observed as follows:  
“The reasons why the Courts will punish for contempt of Court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the Court or even the personal ego of the presiding judge. ...it is about preserving and safeguarding the rule of law.”



69. As a result of the invalidation of the [Contempt of Court Act, 2019](#), [see The [Kenya Human Rights Commission vs Attorney General & Another](#) [2018] eKLR] the substantive law governing contempt proceedings is the [Judicature Act](#). Section 5 of which provides;

- “(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
- (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

70. The law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. This position was affirmed by the Court of Appeal in [Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others](#) (2014) eKLR where it observed as follows:-

“Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act, the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the Contempt of Court Act, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873). The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.”

71. The English law that is applicable in this matter is Part 81 of the [Civil Procedure \(Amendment No 3\) Rules 2020](#). Rule 81.6 is pertinent to this suit as it prescribes the procedure where there is no application for contempt. It provides;

- “(1) If the court considers that a contempt of court (including a contempt in the face of the court) may have been committed, the court on its own initiative shall consider whether to proceed against the defendant in contempt proceedings.
- (2) Where the court does so, any other party in the proceedings may be required by the court to give such assistance to the court as is proportionate and reasonable, having regard to the resources available to that party.
- (3) If the court proceeds of its own initiative, it shall issue a summons to the defendant which includes the matters set out in rule 81.4(2)(a)-(s) (in so far



as applicable) and requires the defendant to attend court for directions to be given.”

72. Rule 81.4(2)(a)-(s) sets out the contents of the summons that should issue to the contemnor as follows:

- a. the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
- b. the date and terms of any order allegedly breached or disobeyed;
- c. confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
- d. if the court dispensed with personal service, the terms and date of the court’s order dispensing with personal service;
- e. confirmation that any order allegedly breached or disobeyed included a penal notice;
- f. the date and terms of any undertaking allegedly breached;
- g. of the claimant’s belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
- h. a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
- i. that the defendant has the right to be legally represented in the contempt proceedings;
- j. that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- k. that the defendant may be entitled to the services of an interpreter;
- l. that the defendant is entitled to a reasonable time to prepare for the hearing;
- m. that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- n. that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- o. that the court may proceed in the defendant’s absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- p. that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- q. that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;



- r. that the court's findings will be provided in writing as soon as practicable after the hearing; and
  - s. that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.
73. A reading of rule 81.6 makes it clear that the Court can suo moto punish for contempt which contempt is not limited to contempt on the face of the Court.
74. The Applicants herein have submitted that pursuant to the enactment of the [Magistrate's Act 2015](#), the subordinate courts are now clothed with the original jurisdiction to hear and punish for contempt, and that order 40 of the [Civil Procedure Rules](#) gives the magistrates the mandate to punish parties who disobey injunctive orders issued by the court. That is true.
75. However, in this matter, I have shown that this court exercised its supervisory jurisdiction over the magistrates' court by transmitting the suit from the Magistrates' court and to dispose of the same, as provided for under Section 18(1) (b) (i) of the [Civil Procedure Act](#).
76. This court must thus refute the Applicants' assertion that it is only the Magistrate who issued the order that should handle contempt proceedings. This court is in no manner purporting to exercise original jurisdiction in this matter, but rather, its lawful supervisory jurisdiction to superintend subordinate courts. Having called the file, the court, under section 3A of the [Civil Procedure Rules](#) had the jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.
77. Rule 81(4) of Part 81 of the [Civil Procedure \(Amendment No 3\) Rules 2020](#) gives this court the jurisdiction to *suo moto* commence contempt proceedings by issuing summons to the contemnor. The contents of Rule 81(4) are intended to ensure that a contemnor is not condemned unheard.
78. It is clear from the record of this Court that the Auctioneer was not only apprised of the existence and contents of the orders in issue in this matter, he was also afforded an opportunity to be heard and did so through his affidavit sworn on November 11, 2022 and his advocate's submissions. In the said Affidavit, the auctioneer admitted that he was executing the orders of this court. Therefore, the auctioneer was aware of the orders that he used to effect the eviction of the people who were on the suit property.
79. It is clear from the Affidavit of the Auctioneer that he received the court order dated October 18, 2022 issued in MC ELC E361/2022 and that his advocate, Mr Nyanyuki, was in court on November 1, 2022, when another order was granted by the magistrate.
80. In his Affidavit and submission by his counsel, the auctioneer asserts that on the advice of his counsel, he found that there was no need of him extracting the orders of November 1, 2022, which orders expressly barred the Applicant from interpreting the orders to mean eviction of the Respondent from the suit property. These orders, which the Auctioneer admits to have had knowledge of, formed the basis of the contempt proceedings.
81. The auctioneer herein, when asked to explain why he purported to execute the orders of the court without the duly signed warrants by the court, and contrary to the order that barred the Applicant from interpreting the order of the court to mean 'eviction,' he never protested, neither did he assert that he was not aware of the orders of the court. That being the case, the issue of the auctioneer having not been notified of the orders of the court, or having not been granted an opportunity to be heard does not arise.



82. It is trite that the authority and dignity of Courts must be upheld at all time. In *Awadh vs Marumbu (No 2)* No 53 of 2004 [2004] KLR 458, it was held as follows:

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.”

83. It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts is upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.

84. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by the Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.

85. Courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of the sacrosanct duty bestowed on it by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.

86. For the reasons I have given above, it is the finding of this court that it acted lawfully when it convicted the auctioneer who purported to execute the orders of the lower court.

87. In the circumstances, the court finds no merit in the Preliminary Objections dated November 16, 2022 and November 17, 2022. The Preliminary Objections are dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022**

**O. A. ANGOTE**

**PRESIDING JUDGE**

**In the presence of;**

Mrs Khadijah holding brief for Ahmednassir for Repsondent

Mr. Ndegwa for Zacharia Baraza - Auctioneer

Mr. Oketch for Applicant

Mr. Muhatia for Interested Party

Court Assistant - June

