



REPUBLIC OF KENYA



Kavinga & 27 others v Teleposta Pension Scheme Registered Trustee (Civil Appeal E438 of 2024) [2025] KEHC 9180 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E438 OF 2024**

**G MUTAI, J
JUNE 18, 2025**

BETWEEN

PETRONILLA KAVINGA 1ST APPELLANT
ROSE SOFALI 2ND APPELLANT
BIDALA RASO 3RD APPELLANT
MOHAMED ALI BAHERO 4TH APPELLANT
SUSAN K. MWAMBURI 5TH APPELLANT
NAFTALI O. MOMANYI 6TH APPELLANT
LWIZOUR AKINYI RAJAB 7TH APPELLANT
SADIK SHEE MBWANA 8TH APPELLANT
AGNES OWANGO 9TH APPELLANT
JAMES OWINO OMANDE 10TH APPELLANT
MARGARET OKWON 11TH APPELLANT
ROSE CHARO KAZUNGU 12TH APPELLANT
NELSON MBELE 13TH APPELLANT
ZAKIA ABDALLA 14TH APPELLANT
HENRY NJIRU 15TH APPELLANT
LUCY NJERI MUREITHI 16TH APPELLANT
BEZOKA NYAE AMARI 17TH APPELLANT
ESTHER GITHUNGO 18TH APPELLANT
LUCY PONDA 19TH APPELLANT



ESHA HEMED	20 TH APPELLANT
GEOFFREY OIRA	21 ST APPELLANT
KOSOLO MUNZUU	22 ND APPELLANT
JOSEPH AKANGA	23 RD APPELLANT
SULEIMAN ASORO	24 TH APPELLANT
KULSUM K.S. ABDULFARAJ	25 TH APPELLANT
CELINA A OKETH	26 TH APPELLANT
RAMMSONY MOKARE	27 TH APPELLANT
MAIMUNA SALEH	28 TH APPELLANT

AND

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEE RESPONDENT

RULING

1. Being aggrieved with the judgment of Hon JB Kalo, Chief Magistrate, delivered on 27th November 2024 in CMCC NO 160 of 2014; Teleposta Pension Scheme Registered Trustees v Jennifer Odhiambo & 29 others, the appellants herein appealed to this Court against the whole of the said decision.
2. The appeal raised three grounds, to wit that: -
 1. The learned trial magistrate erred in fact and law, and failed to refer the matter to arbitration as is required by the trust deed;
 2. The learned trial magistrate erred in fact and law in finding that the appellants were tenants instead of landlords; and
 3. The learned trial magistrate erred both in fact and in law in failing to properly evaluate the evidence before him, thereby reaching a wrong conclusion of facts and law, causing a miscarriage of justice.
3. Vide an application brought under a certificate of urgency dated 29th January 2025, the appellants/ applicants sought the following orders: -
 1. This honourable Court does grant the appellants a stay of execution of the Hon JB Kalo's judgment delivered on 27th November 2024 in CMCC No 160 of 2014; Teleposta Pension Scheme Registered Trustees v Jennifer Odhiambo & 29 others pending the hearing and determination of the appeal herein;
 2. Spent; and
 3. Costs of this application.
4. The application is premised on the grounds in the body of the motion as well as on the affidavit of Mr Yusuf M Aboubakar, the learned counsel for the appellants. It was urged that the appellants were threatened with eviction unless the application was allowed, and that if that happened, the appeal would be rendered nugatory. Furthermore, it was contended that the respondent wouldn't suffer any



- prejudice if the sought orders were granted, and lastly, allowing the application would be in the interest of justice.
5. In the affidavit in support of the application, Mr Aboubakar deposed as above. He attached a copy of the judgment.
 6. I have perused the said judgment. I note that the Court ordered the appellants to vacate the suit premises within 30 days of the 27th November 2024, failing which they would be evicted pursuant to the provisions of section 152G of the Land Act. The respondent was awarded the costs of the suit and the expenses of the eviction process, where necessary.
 7. Upon being served with the application the respondent, through the form of Kale Maina & Bundotich LLP filed an application dated 29th January 2025 vide which they sought to have the Memorandum of Appeal dated 19th December 2024 and application dated 29th January 2025 struck out for want of jurisdiction and that any conservatory orders that may have been issued be set aside.
 8. The application was based on the ground that under Article 162 (2) of the Constitution as read with Article 165(5) and Section 13(2) (d) of the Environment and Land Court Act the High Court had no jurisdiction to hear and entertain an appeal arising from contracts accruing on immovable property and that the proper Court is the Environment and Land Court. The application was also based on the affidavit of Ms Catherine Masyuki, sworn on 29th January 2025. Ms Masyuki deposed that this honourable Court had no jurisdiction to hear and determine the matter and that it also lacked jurisdiction to transfer the same to the Court with jurisdiction.
 9. Ms Masyuki also deposed to a replying affidavit sworn on 3rd February 2025 in opposition to the application for stay of execution. She averred that she is the property manager of the respondent. Ms Masyuki averred that it was improper for Mr. Yusuf M. Aboubakar to make depositions on factual matters in a contested suit. For that reason, she urged, he lacked the locus to swear the affidavit, and that the same should thus be struck out.
 10. She averred that the suit in the Court below was undefended. For that reason, their evidence was uncontroverted. She questioned how they could sustain an appeal against a decision arising out of a suit they chose not to defend. She deposed that the appellants/applicants owe the respondent a lot of money on account of rent arrears, yet some of them draw pensions from the respondent. Ms. Masyuki averred that allowing the application would not be in the interest of justice as the respondent depends on accruals from rent to pay pensions. She therefore prayed that the application and the appeal be struck out.
 11. Mr. Yusuf Aboubakar filed a further affidavit sworn on 15th March 2025. Mr. Aboubakar averred that as counsel for the appellants/applicants, he could swear an affidavit on behalf of his client based on the advocate/client relationship. He stated that what he deposed were not contentious matters.
 12. Mr. Aboubakar averred that the appellant/applicants were landlords and not tenants in the premises and that there was therefore no basis for them to pay rent. He denied that his clients did not testify in the Court below and averred that they did and that the Court chose to disregard their testimony.
 13. In opposition to the Notice of Motion dated 29th January 2025, Mr Aboubakar filed a replying affidavit sworn on 1st April 2025 in which he averred that the respondent was a trust and that the appellants/applicants were members thereof. He further averred that although an order was issued in the Court below that the matter be referred to arbitration, that was never done. In his view, the failure to refer the matter to arbitration rendered the subsequent proceedings null, void, and illegal.



14. He deposed that the Court below, having found the dispute to be one between trustee and beneficiaries, the matter was never about a landlord and tenant relationship as alleged. For that reason, the proper Court was the High Court and not the Environment and Land Court. He averred that no tenancy agreement was ever produced. For that reason, the proper forum for the determination of the appeal was the High Court.
15. The appellants/applicants' counsel filed two sets of submissions. The first is dated 1st April 2025. Vide these submissions, he urged that under Section 14 (1) of the *Trustees (Perpetual Succession) Act*, the question as to whether a person was a member of a body corporate under the Act should be presented to the High Court. It was submitted that the said question was the primary issue in the Court below. He urged that under section 2 of the Trustees Act, the term "Court" refers to the High Court.
16. Mr. Aboubakar relied on the decision of the Court in *Chemweno v Kalya & 4 others; Chemweno & 11 others (Interested Parties)* [2024] KEHC 4074 (KLR), in which the Court found as follows: -

“Upon assessing the matter, I agree with the Plaintiff that the Preliminary Objection is based on a misapprehension. The Objection presumes that the matter should be placed before the Environment and Land Court simply because amongst the properties and assets managed by the Defendants, as Trustees, include parcels of land. As submitted by the Plaintiff, I agree that the Defendants have not sufficiently explained or provided any details of how the prayers made in the Originating Summons relate to “the environment and the use and occupation of, and title, to land”. There is also no provision of the law cited as empowering the Environment and Land Court to grant the prayers sought. I have carefully gone through each one of the prayers, and I am unable to find any that can be granted under the jurisdiction donated to the Environment and Land Court. To my mind, the prayers sought relate to the alleged mismanagement of trust properties and not to any dispute(s) relating to ownership or land use or occupation.”
17. Counsel submitted that it did not matter that land was involved. What mattered was the instrument setting out the relationship between the parties. That instrument was the trust deed registered under the *Trustees (Perpetual Succession) Act* and managed under the Trustees Act. In his view, any dispute arising from the said trust deed should, he submitted, be heard and determined by the High Court.
18. In the submissions in response to the respondent's application dated 1st April 2021. It was urged that the High Court had jurisdiction. Counsel relied on the same argument as that outlined above; I will not, therefore, rehash the same here.
19. The submissions of the respondent in opposition to the application for stay of execution pending appeal are dated 11th February 2025. Counsel for the respondent urged that to succeed the appellants/applicants had to show that they had an arguable, that they would suffer substantial loss of the application was denied, that the application was filed without undue delay and that they must set out or offer such security for the due performance of the decree as may be ultimately binding on them.
20. On whether there was an arguable appeal, it was urged that the matter before the Court below was undefended as the appellants did not testify or tender any evidence whatsoever in the subordinate court in their defence. It was urged that for that reason, there was no arguable appeal.
21. Counsel denied that the appellants/applicants would suffer substantial loss. He submitted that they had failed to specify or outline the nature of the loss they would suffer.



22. It was urged that the appellants/applicants were tenants in the premises of the respondent. They had failed to pay rent. The appellant/applicants had not specified the nature of the security they would provide for the due performance of the decree, which may ultimately be binding upon them.
23. The respondents' counsel thus prayed that the application be dismissed with costs.
24. In support of its application seeking to strike out the suit, and the application also dated 29th January 2025 submitted, vide written submissions dated 11th February 2023, that the proper forum for the determination of the issues in dispute is the Environment and Land Court.
25. Counsel relied on the provision of section 13 of the *Environment and Land Court Act*, which states as follows: -
 - “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”
26. Counsel submitted that the impugned decision arose out of the determination of the Court below on prayer for the eviction of the appellants/applicant from the premises built on immovable property, which cause of action was purely within the purview of the Environment and Land Court. The decision was made by the Subordinate Court, which has donated jurisdiction to hear and determine land matters. For that reason, the appeal should have been filed at the Environment and Land Court.
27. Relying on the case of Owners of the Motor Vessel Lilian “S” v Caltex Oil (Kenya) Ltd KECA 48 (KLR), the counsel for the respondent urged that this Court ought to lay down its tools for want of jurisdiction.
28. Counsel submitted that the jurisdiction of the Environment and Land Court to hear and determine landlord and tenant matters was considered in the case of Nakumatt Holdings Ltd & Atul Shah v Ideal Location Ltd [2019] KECA 153 (KLR)
29. Flowing from the foregoing, it was urged that the appeal from the Court below ought to have been filed at the Environment and Land Court and not to this Court.
30. The counsel for the respondent thus urged that the Court dismiss the appeal for being defective with costs to it.



31. I have considered the two applications. Since the respondent's application raises questions of jurisdiction, I shall consider it first. If I determine that I have no jurisdiction, there would be no need for me to consider the application for a stay of execution, as I would thereby be obliged to put down my tools immediately.
32. I have perused the pleadings in the Court below. I note that in the plaint dated 31st January 2014 the respondent averred that it was the owner of the identified premises (paragraph 3) and that the defendants (now the appellants/applicants) are tenants in named premises (under a tenancy agreement) and that they failed to meet their obligations (paragraph 4 and 5 of the Plaint). Having not met their obligations, the respondent (the Plaintiff in the Court below) sought to have the defendants (now the appellants/applicants) evicted.
33. After hearing the matter, the Court below found as follows: -
- “It is the Plaintiff's case that the defendants have defaulted in paying rent...
- The evidence presented on behalf of the Plaintiff is uncontroverted, since none of the defendants testified in opposition to the suit. Based on the evidence on record and after considering the submissions made herein, the Court finds and holds that the Plaintiff has proved its case against the defendants. Consequently, judgment is entered for the Plaintiff against the defendant...”
34. The Court thus issued eviction orders that would be undertaken under section 152G of the *Land Act*.
35. The question before this Court is whether it has the jurisdiction to hear and determine the appeal. To do this, I must set out the applicable statutory and constitutional provisions.
36. Article 162(2) of *the Constitution* provides that: -
- “(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.”
- This has to be read together with Article 165(5) of *the Constitution*, which states that: -
- “(5) The High Court shall not have jurisdiction in respect of matters—
- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”
37. It is clear from the foregoing that the Kenyan people, seeking to have land and environment matters and employment and labour relations disputes resolved by specialized, High Court status courts, chose deliberately to deny jurisdiction to the High Court to hear and determine matters to do with “environment and the use and occupation and title to land.” Since we are in a constitutional democracy, the people's choice must be respected and adhered to.



38. Section 13 (1) and (2) of the *Environment and Land Court Act* lists down matters which may be heard and determined by the said Court. It states that:-

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”

39. It is the law that jurisdiction is everything. This observation was stated emphatically in the laconic words of Nyarangi, JA in the owners of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) in the following terms:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

40. The Supreme Court of Kenya made a similar finding in the case of Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) where it held at paragraph 68 of its ruling as follows:-

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial



craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*.”

41. In my view, and with due respect to the counsel for the appellants/applicants, the issues in contention in this matter are of the landlord and tenant relationship and the desire of the respondent to evict the appellants and recover possession of the demised premises. Those are the issues, succinctly put, in contention herein, which are the subjects of the appeal before me. The question of whether a trustee and beneficiary relationship existed wasn't canvassed before the Court below, as the appellants/applicants failed to prosecute their defence. In the circumstances, I am unable to agree with him that the holding in *Chemweno v Kalya & 4 others; Chemweno & 11 others (Interested Parties)* [2024] KEHC 4074 (KLR) (supra). The case in question arose from a dispute regarding the management of a trust that owned assets, including land.
42. Does this Court have jurisdiction in landlord and tenant appeals and questions regarding repossession of demised premises? I am afraid not. Such matters relate to “use, occupation, and title to land.”
43. I am guided by the decision of the Court in the case of *Nakumatt Holdings Limited & another v Ideal Locations Limited* [2019] KECA 153 (KLR) where it was held that:-

“30. Given the background to the matter as set out above, there can be no doubt that the subject matter of the suit, and the cause of action arose from the sub-lease over L.R. No. 14407 and 16088 under which the landlord leased a portion of those premises to Nakumatt.

That, as the learned Judge correctly concluded, is a matter within the class of “use and occupation” of land under Article 162(2) of *the Constitution* and therefore within the jurisdiction of the ELC under Section 13 of the ELC Act. Under Article 162(2) of *the Constitution*, Parliament was empowered to “establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land” and to “determine the jurisdiction and functions of such Courts”. Pursuant thereto, Parliament enacted the *Environment and Land Court Act*. Section 13(1) of that Act outlines the jurisdiction of the ELC as follows:

- “(2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court [the ELC] shall have power to hear and determine disputes-
- (a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.



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

31. Given those provisions, we are fully in agreement with the learned Judge that the dispute between the parties, stemming as it did, from the sub lease over the leased premises over L.R. No. 14407 and 16088, is a matter falling within the jurisdiction of the ELC.”

44. The decision above was made by the Court of Appeal and binds this Court.

45. Further to the foregoing, I note that the prayer sought was for the eviction of the appellants/applicants. Eviction may only be done under the provisions of the *Land Act*. The said Act defines the word “Court” as being the Environment and Land Court (section 2 thereof).

46. In my view, the respondents’ application dated 29th January 2025 has merit. This Court has no jurisdiction to hear and determine the appeal and the application before it. The same were filed in the wrong Court. Since I lack jurisdiction to hear the matter, it follows logically that I also lack jurisdiction to transfer it.

47. In the circumstances, I strike out the appeal filed herein. I also struck out the application for a stay pending appeal. The respondent shall have the costs of the appeal and also of the application.

48. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 18TH DAY OF JUNE 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Chaka Bora, holding brief for Mr Aboubakar, for the Appellant/Applicant;

Mr Bundotich, for the Respondent; and

Arthur – Court Assistant.

