



REPUBLIC OF KENYA



**Tenai v Cheluget (Civil Appeal E137 of 2022) [2025] KEHC 11131 (KLR) (28 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11131 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E137 OF 2022  
PN GICHOHI, J  
JULY 28, 2025**

**BETWEEN**

**JOSEPH KIPLAGAT TENAI ..... APPLICANT**

**AND**

**COSMAS CHELUGET ..... RESPONDENT**

*(An Appeal from the Judgement of the Chief Magistrate's court at Nakuru by  
Hon. J.B.Kalo (CM) delivered on 27th January, 2022 in Civil Suit No. 91 of 2015)*

**RULING**

1. The background of the subject of this ruling is that vide a Memorandum of Appeal dated 14<sup>th</sup> October 2022, the Appellant appealed against the judgment of the trial Court captioned above, and based on 7 grounds that:-
  1. The Honourable Magistrate erred in law and fact by making findings in favour of the Respondent.
  2. The Honourable magistrate erred in law and fact by entering judgment against the Appellant without considering the evidence on record and presented by the Appellant.
  3. The Honourable Magistrate erred in law and fact by making a finding that the Respondent had proved his case on a balance of probability which was not the case.
  4. The trial Magistrate erred in law and fact by failing to consider the weight of issues raised in the Appellant's plaint filed and the evidence presented.
  5. The trial Magistrate erred in law and fact by machining findings on issues not pleaded or presented by the evidence.
  6. The learned trial Magistrate court erred in fact and law by not appreciating the submissions of the learned counsel for the Appellant and finding in favour of the Respondent herein.



7. In all the circumstances of the case, the finding of the trial Magistrate are insupportable in law or on the basis of the evidence adduced.
2. Before directions on disposal of this Appeal were given, the Respondent herein filed a Notice of Preliminary Objection 20<sup>th</sup> November 2023 against the Appeal on the grounds that:-
  1. This Honourable Court lacks requisite jurisdiction to hear and determine this Appeal for reasons that the Appellant is seeking to set aside judgment on land matter within the purview of the Environment and Land Court.
  2. The provisions of Article 162 (2) (b) of *the Constitution* of Kenya 2010 as read together with Section 13 (1) of the *Environment and Land Court Act* No. 19 of 2011 ousts this Court of jurisdiction to hear and determine the matter.
  3. The Appeal filed herein is an abuse of the Court process .
3. For those reasons, the Respondent seeks that the Appeal be dismissed with costs.

### **Respondent's Submissions**

4. In his submissions dated 26<sup>th</sup> May, 2025, the Respondent highlighted that in the Appellant's suit before the honourable magistrate, the Appellant alleged that the Respondent was interfering with his peaceful occupation of the land and was threatening to evict him.
5. Respondent submitted that on the other hand, his defence was that:-
  - \* The Respondent had not threatened to evict the Appellant.
  - \* Had not threatened the Appellant's life, .
  - \* The Appellant is not the owner of all that parcel of land namely Nakuru /Njoro /Nesuit /846 .
  - \* The Respondent agreed that they made an agreement ; paid the purchase price and took possession of the land parcel.
  - \* The matter proceeded to full hearing and the Appellant's suit was dismissed with costs.
6. Counsel for the Respondent therefore submitted that this Preliminary Objection fits the definition set out in classic case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA.
7. On jurisdiction, counsel maintained that this Court's jurisdiction is livelihood of any judicial process and where it lacks, the Court has to down its tools. In support, the Respondent placed reliance on several cases including classic case of The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. [1989] KECA 48 (KLR) where Nyarangi J.A stated:-

“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.”



8. Further, reliance was placed in the Supreme Court’s decision in *Dikson Ngigi Ngugi v Commissioner of Lands* Petition No. 9 of 2019 [2019] eKLR where it was held that: -

“Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority.”

9. In conclusion, Counsel submitted that the forum existing for litigation of land matters is the Environment and Land Court and not this Court. He therefore urged this Court to down its tools and dismiss the Appeal with costs.

### **Appellant’s Submissions**

10. These submissions are dated 15<sup>th</sup> July 2025 and on jurisdiction, Counsel submitted that jurisdiction is what gives the Court power to hear and determine the matter reliance was placed on the Supreme Court’s decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited 7 & 2 Others* [2012] eKLR where the Court discussed the question of jurisdiction at length.
11. On Preliminary Objection Counsel relied on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA but submitted that the filing of suits and documents where one is represented is purely the responsibility of the Advocate and in this case, the appeal was erroneously filed in the High Court rather than the Environment and Land Court and this was a mistake by the Advocates for the Appellant.
12. While citing the Court of Appeal decision in *Philip Chemwolo and another vs Kubeda* [1988]KAR 103, Counsel urged allowing the appeal would favour equity since the matter will go to trial where all parties will have an opportunity to put their respective facts before the tribunal on facts.
13. Further, Counsel relied on the Court of Appeal decision in *Karl Wehner Classen vs Commissioner of Lands & 4 others* (2019) where the Court held :-
- “...in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of *the Constitution*.”
14. Counsel therefore submitted that this is a procedural technicality. That it is a dispute over the matter was filed in the High Court from whose status, the ELC Court conferred authority as it was given authority similar to the High Court. Counsel continued and submitted that matters that were pending in the High Court were transferred to ELC Court if they were touching on matters relating to land and therefore, High Court definitely had the jurisdiction to hear and determine the matter.
15. Counsel’s view was that the Court has jurisdiction to hear and determine while an ELC matter, the High Court being superior to the Magistrates Court cannot lack jurisdiction to handle an ELC matter which was being handled by a subordinate court as that would defy the order of hierarchy.
16. On an award of costs, Counsel relied on the case of *Jasper Singh Rai and 3 others v Tarlochan Singh Rai and 4 others* [2014]eKLR and submitted that the discretion of the Court is to be exercised judicially



and that the awarding of costs is not to penalise the losing party but a means for the successful litigant to recoup the expenses put in fighting an action.

### **Analysis and Determination**

17. After hearing both parties in their submissions on the Preliminary Objection, it is important to highlight that on 14<sup>th</sup> May 2025, the parties agreed and directions were given that the Preliminary Objection be served again on the Appellant as Ms Kiprop for the Appellant claimed not to have been served. The parties agreed and the Court gave directions that the Preliminary Objection be disposed of by way of written submissions, each having 14 days starting with the Respondent for compliance on 14<sup>th</sup> July 2025.
18. Instead of complying with the said directions, the Counsel for the Appellant filed under a certificate of urgency a Notice of Motion dated 24<sup>th</sup> June, 2025, brought under Sections 1A, 1B, 3A and Section 18 (1) of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules and Article 159 of *the Constitution*, seeking Orders that:-
  1. This Court be pleased to transfer this Appeal being High Court Appeal No. E137 of 2022 to Environment and Land Court at Nakuru for hearing and determination.
  2. Pending hearing and determination of this Application, further proceedings in this matter be stayed.
  3. The Costs of the Application be provided for.
19. The grounds were that:-
  1. The subject matter of the appeal concerns ownership and occupation of land and thus falls within the jurisdiction of the Environment and Land Court (ELC).
  2. The appeal was inadvertently filed before the High Court due to an error on the part of the counsel for the Appellant.
  3. No prejudice shall be occasioned to the Respondent if the matter is transferred to the proper forum.
  4. The Respondent filed a Preliminary Objection challenging jurisdiction.
  5. This Honourable Court has power under section 18 of the *Civil Procedure Act* to transfer the matter to the court with competent jurisdiction.
20. That Application was supported by the Appellant's Affidavit sworn on 24<sup>th</sup> June 2025 and at the Certificate stage, this Court published its Orders dated 4<sup>th</sup> July 2025 that this matter already has date and is scheduled for mention on 14/7/2025, hence the said date was retained.
21. On 14<sup>th</sup> July 2025, Mr. Gai for the Respondent informed the Court that the Appellant had not filed submissions in response but filed the application for transfer to which the Respondent had responded to. However, he urged that the Preliminary Objection take precedent as it is on jurisdiction.
22. While confirming that the Preliminary Objection was pending, Ms. Kiprop for the Appellant prayed that the Appellant's application seeking transfer of the Appeal to the Environment and Land Court be heard before the Preliminary Objection is dealt with.



23. Upon being asked by this Court why she had not complied with the directions earlier given by this Court in regard to the Preliminary Objection, Ms Kiprop sought three (3) days to comply by filing and serving the submissions on the Preliminary objection.
24. Mr. Gai did not object to the request for the Respondent to file the submissions on the Preliminary Objection.
25. The Appellant was granted the request to comply with the orders of 14<sup>th</sup> May 2025 in regard to the Preliminary Objection and attend Court for compliance on 17/7/2025. That was done and this Court gave this date for ruling on the Preliminary Objection.
26. After hearing the parties in their submissions, the issues for consideration are :-
  1. Whether this Court has jurisdiction to hear and determine this appeal.
  2. Whether this Court should transfer this appeal to ELC Court.
  3. Who should bear the costs.
27. To start with, it is now settled law that a Preliminary Objection should be on a pure point of law and capable of disposing the matter . In this case, it is clear that the suit before the trial court was on ownership and occupation to land being Nakuru /Njoro /Nesuit /846 and that is a fact admitted by the Appellant herein. The issue as to whether this Court has jurisdiction to hear and determine this appeal is therefore a point of law and is capable of disposing of the matter as held in Mukisa Biscuit Manufacturing Co. Ltd (supra).
28. Regarding jurisdiction, both parties aptly capture its importance as it is jurisdiction that gives a court power to hear and determine the matter before it and without jurisdiction, a court must down its tools as well settled in The Owners of the Motor Vessel “Lillian S”(supra).
29. Regarding the source of jurisdiction, the Supreme Court in Samuel Kamau Macharia & another (supra) that :-

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The issue as to whether a court of law had jurisdiction to entertain a matter before it, was not one of mere procedural technicality; it went to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings

Where *the Constitution* exhaustively provided for the jurisdiction of a court of law, the court must operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation. Nor could Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* conferred power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

30. Further in Dickson Ngigi Ngugi (supra), the Supreme Court held:-

It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by *the Constitution* or statute. It cannot be conferred by judicial craft. See Samuel Kamau Macharia & another v Kenya commercial Bank & 2 others, SC



Application No 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have.”

31. Flowing from above principles, the Environment and Land Court was established pursuant to Article 162 (2) of the Constitution of Kenya which provides that :-

“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. [Emphasis added]

32. Regarding this appeal, the appellate jurisdiction is well set out under the Environment and Land Court Act . Section 13 (1) thereof provides 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.”

33. Despite the spirited submissions and arguments by the Appellant, in regard to action this Court should take on this Appeal, the filing of the appeal before this court is not a procedural technicality and whether or not it was filed by inadvertent error of the Advocate cannot save it. The decision in Karl Wehner Classen (supra) relied on by the Appellant was based on very different circumstances. The holding of the Court of Appeal was as follows:-

- (16) The deceased petitioner’s main claim was for compensation for the deprivation of several parcels of land in the sum of nearly Kenya Shillings 14 billion. That cause of action survived for the benefit of his estate. The learned judge erroneously relied on the Uganda statutory provisions in arriving at a decision that the petition had abated. The finding that the proceedings (petition) had abated is contrary to the express provisions of section 2(1) of the Law Reform Act and section 82(a) of the Law of Succession Act and the purpose of Article 22(2). We are in agreement with the decision of the High Court in Elizabeth Kwini case (supra), that, whether or not a right to action in a constitutional petition survives the death of the petitioner depends on the nature of the petition and the relief sought and find that in the circumstances of



this case the constitutional petition seeking compensation for deprivation of property survived for the benefit of the estate upon the death of the petitioner and may be continued by the appellant as a legal representative of the deceased petitioner. There is no cross-appeal against the finding of the trial judge that in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of *the Constitution*.”

34. In this case, there are express provisions of the law as to which court has jurisdiction to handle the appeal herein. This Court has no jurisdiction to hear and determine this Appeal. That jurisdiction lies with the Environment and Land Court. There are no procedural technicalities in this Appeal.
35. As rightly put and submitted by the Respondent, it is settled law that without jurisdiction, this Court has to down its tools.
36. Regarding the issue of transfer as raised in submissions by the Appellant based on the argument that the Appeal was filed by error committed by the Advocate on record, refuge was being sought in Philip Chemwolo and another (supra) where Apaloo JA stated :-

I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree.”

37. It therefore true that blunders do happen but the circumstances and the issues in the above matter are different from this matter and therefore , the above decision will not aid the Appellant.
38. The application for transfer of this Appeal to the Environment and Land Court raised long after the Preliminary Objection filed is an afterthought and cunningly intended to defeat the Preliminary Objection whose directions on its disposal had already been made hence the line of submissions by the Appellant as noted herein. In any event, this Court cannot transfer an appeal filed in a Court without jurisdiction.
39. Regarding Costs, it is well captured by parties that the discretion to award costs is within the discretion of this Court.
40. Accordingly, the Preliminary Objection dated 20<sup>th</sup> November, 2023 is allowed in that the Appeal dated 2<sup>nd</sup> March 2023 is struck out with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF JULY, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:



N/A for Ms. Kiprop for the Applicant

Mr. Gai for the Respondent

Ruto, Court Assistant

