



Hakim & 7 others v Director of Public Prosecution & 6 others (Petition E054 of 2022) [2024] KEHC 6653 (KLR) (Civ) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

PETITION E054 OF 2022

LN MUGAMBI, J

JUNE 7, 2024

BETWEEN

OJAY HAKIM 1ST PETITIONER
PETER NJUGUNA 2ND PETITIONER
MARTIN MUIA 3RD PETITIONER
BENARD KOTONYA 4TH PETITIONER
DR OJWANG 5TH PETITIONER
STEVE BIKO 6TH PETITIONER
**SARAH MAINA (SUING IN THEIR CAPACITY AND ALSO THE OFFICIALS
OF THE VILA ESTATE RESIDENTS ASSOCIATION) 7TH PETITIONER**
DOUGHLAS JUMA 8TH PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT
OCS VILLA POLICE STATION 4TH RESPONDENT
MAKADARA CHIEF MAGISTRATE COURT 5TH RESPONDENT
MUHAMAD JAMIL JOZ 6TH RESPONDENT
ELIAS KARANI NDAMBIRI 7TH RESPONDENT



RULING

Introduction

1. This is a ruling in respect of the Respondents' Notice of Preliminary Objection dated 7th February 2022 as against the Petition dated 7th February 2022.
2. A synopsis of facts leading to the filing of this Petition is that the 6th and 7th Respondents commenced a construction on L.R No.3858/44 that included perforation of Villa Franca Estate perimeter wall, an act that the Petitioners contend was contrary to the Villa Franca Residents Estate Association Constitution (The Association) which governs the affairs of the Estate and binds all the residents. The Petitioners allege that their intervention against the construction is premised on the fact the "perimeter wall belongs to the Villa Franca Estate as whole." They thus asked the 6th and 7th Respondent to halt the development. The 6th and 7th Respondent did not stop. A dispute evolved between the officials of the Association and the 6th and 7th Respondents. It is alleged that as the controversy heightened, the 6th and 7th Respondents called the police on the 1st Petitioner and 8th Petitioner who is the Chairman of the Association and a security guard at the Estate respectively. The duo was arrested and detained for an offence of malicious damage to property as per the cash bail that was issued to them but on the eve of their presentation to Court on 18th January, 2022; the charge was changed to Robbery with violence in respect of an amount to the tune of Kshs. 6,750/-.
3. The thrust of the Petitioners complaint is that criminal process is being diverted from its proper use to oppress them by pressing of criminal charges so as to silence them from voicing the concerns of Villa Franca Estate residents.
4. In response to the Petition, the Respondents' filed a Preliminary objection on citing the following grounds:
 - i. This Court lacks jurisdiction to hear and determine the Petition as the dispute relates to the environment and the use and occupation of, and title to, land by virtue of the provisions of Article 165(5) (b) of the Constitution.
 - ii. Section 13 of the Environment and Land Court Act provides that the Environment and Land Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution. Further shall have power to hear and determine disputes relating to environmental planning and protection, land use planning, title, tenure, boundaries, rates valuations, mining minerals and other natural resources; disputes relating to public, private and community land and contracts, choses in action or instruments granting any enforceable interests in land and any other disputes relating to environment and land.
 - iii. Section 13 (7) of the Environment and Land Court Act provides that the Environment and Land Court can issue prerogative orders, which provision if read together with the provisions of Article 162(2) of the Constitution ousts the jurisdiction of this Court to hear and determine this case.
5. This was the position adopted by the 6th Respondent in his Replying affidavit to the Petition dated 30th October 2023.



Respondents' Submissions__

6. On 2nd June 2022, State Counsel Christopher Marwa, filed submissions in support of the Preliminary objection. He submitted that this Court lacks jurisdiction to entertain this Petition as the issues relate to environmental planning and protection, land use planning and titles and boundaries. For this reason, Counsel was emphatic that the proper Court that to handle the matter is the Environment and Land Court (ELC Court) under Article 162 (2) (b) of the *Constitution*. This is further affirmed under Section 13 of the *Environment and Land Court Act*.
7. Reliance was placed in *Omar Tabir Said v Registrar of Titles and another* (2013) eKLR where it was held that:

“It follows that the High Court’s enforcement jurisdiction does not extend to matters relating to disputes falling under Section 13(2) of the *Environment and Land Court Act*. That is the preserve of the Environment and Land Court. There is need for this clarity so that litigants know which court has jurisdiction in respect to which dispute. Perceptions and suspicions of forum shopping would be minimized or eliminated.”
8. He similarly relied on the cases of: *Julius Kea Mbawa v Director of Criminal Investigations and another; Chunky Limited and 5 others (Interested Parties)* (2020) eKLR, *Mohammed Said v County Council of Nandi* (2013) eKLR, *Joyce Mutindi Muthama & another v Josephat Kyololo Wambua and 2 others* (2018) eKLR and *Kuria Kiarie Kiromo v Settlement Fund Trustees and 3 others* (2021) eKLR.
9. For that reason, Counsel citing *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others* (2012) eKLR, submitted that a Court cannot arrogate itself jurisdiction exceeding what is conferred upon it by law. As such Counsel argued that the Petition should be dismissed as was before the wrong forum. Similar reliance was placed in *Peter Gichuki King’ara v Independent Electoral and Boundaries Commission & 2 others* (2014) eKLR.
10. Counsel further argued that the Petitioners lack *locus standi* to institute this suit on behalf of the estate of the deceased persons without letters of administration.

Petitioners' Submissions__

11. In response, the Petitioners opposed the preliminary objection by filing submissions dated 31st March 2022 through Arusei and Company Advocates.
12. Counsel relying in *Mukisa Biscuit Manufacturing Company LTD v West End Distributors LTD* (1969) EA 696 and *Oraro v Mbaja* (2005) 1 KLR 141 submitted that the objection raises factual aspects calling for proof. This is because, the Petitioners are challenging the alleged malicious criminal process instigated against them over a civil matter.
13. Considering this, it was argued that the objection fails the threshold set objections. Reliance was placed in *Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and others* (2013) eKLR where the Court of Appeal held that:

“While the law (Section 193A of the *Criminal Procedure Code*) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith...It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn



in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely a civil dispute.”

14. The Petitioner’s Advocate contended that the issues raised in the Petition relate to violation of Petitioners rights and meet the threshold of Constitutional Petitions as set out in *Anarita Karimi Njeru v Attorney General* (1979) KLR 154 and reaffirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance and others* (2013) eKLR.
15. In particular Mr. Arusei underscored that the grievance was mainly about the improper use of the criminal justice in a purely civil dispute pitting the residents against the 6th and 7th Respondents hence the need for the Court to intervene. Counsel thus asserted that this Court has jurisdiction to entertain the Petition.
16. To that extent, Mr. Arusei clarified that the Petitioners had in fact withdrawn Prayers (f) and (g) that related to the disputed environment and land issues vide a Notice of Withdrawal dated 21st March 2022. (The Notice is available on the Court Online Portal (CTS)). To this end, Counsel urged the Court to dismiss the Preliminary Objection as fails the requisite threshold and lacks merit.

Analysis and Determination

- i. Whether the preliminary objection dated 7th February 2022 satisfies the established threshold.
- ii. Whether the preliminary objection is merited.

Whether the preliminary objection satisfies the threshold of a Preliminary Objection

17. A preliminary objection is raised to bring to the Court’s attention an important matter of law that the Court must consider before deciding on merits of a case. The celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd (Supra)* is what defined the test for a preliminary objection. This yardstick was later emphasized by the Supreme Court in the *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* (2014)eKLR as follows:

“(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd -v. - West End Distributors* (1969) EA 696:

“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”.

18. Discussing its nature in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR, the Court stated:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A



preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

19. From the reading of the above decisions, it is clear therefore that a Preliminary Objection must portray the following vital characteristics:
 - i. It must be on a pure point of law, not factual matters.
 - ii. It is argued on assumption that all facts pleaded by the party against whom that objection is targeted are correct.
 - iii. If any fact has to be ascertained or if what is sought in the objection is an exercise of judicial discretion, it cannot be raised.
 - iv. If successful, it must be capable of disposing the suit without the need of proceeding to full trial.
20. The preliminary objection herein is based on the ground that this Court lacks jurisdiction to entertain the matter because the issues raised in the Petition relate to environment and land. A jurisdictional question is fundamental legal question.
21. The Supreme Court in *Samuel Kamau Macharia & Another (supra)* held:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers 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.”
22. Jurisdiction therefore is a matter of law because if it is raised and the Court finds it has no jurisdiction, it has no choice but to terminate and drop the matter at that stage. I will now venture into the second issue of whether or not the preliminary objection raised herein has merits.

Whether the Preliminary Objection is merited ___

23. The Environment and Land Court is one of the two Special Courts which the *Constitution* mandates Parliament to establish under Article 162 (2) (b) which provides as follows:
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:
 - a. ...
 - b. the environment and the use and occupation of, and title to, land.



- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
24. Parliament in compliance with the above Article enacted the *Environment and Land Court Act* No. 19 of 2011 (ELCA). The Environment and Land Court is established under Section 4 (1) of the Act while Section 13 sets out the jurisdiction of the Court 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.
 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*.
 4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
 5. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - a. interim or permanent preservation orders including injunctions;
 - b. prerogative orders;
 - c. award of damages;
 - d. compensation;
 - e. specific performance;
 - f. restitution;
 - g. declaration; or
 - h. costs.



25. The Court of Appeal in *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR while interpreting Article 162 of the *Constitution* held as follows:

“70. Contrast the expression “reserved for the exclusive jurisdiction” with the expression “falling within the jurisdiction”. It is a pointer, in our view, that it was never intended that disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land would be “reserved for the exclusive jurisdiction” of the specialized courts under Article 162(2). It is also noteworthy that In *Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR, the Supreme Court of Kenya in construing Article 165(3) of the Constitution that confers jurisdiction on the High Court to hear any question respecting the interpretation of the Constitution noted that although the High Court was entrusted, under that Article, with the mandate to interpret the Constitution, that

“empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction.”

71. By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates’ courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases.”

26. Furthermore, dealing with cases that raise both environmental and constitutional issues, the Court in *Benson Makori Makworo v Nairobi Metropolitan Services & 2 others* (2022) eKLR guided by the Superior Court’s opine stated as follows:

“25. The issue of the jurisdiction of the specialized Courts has been determined with finality by the superior Courts in the famous *Karisa Chengo & 2 others v Republic* case. The Court of Appeal in *Karisa Chengo & 2 others v Republic* Civil Appeal Nos. 44, 45 & 76 of 2014 [2015] eKLR observed as follows: -

The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in the Constitution for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment ... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and



environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in the Constitution of a statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court...

26. The matter was appealed to the Supreme Court in Petition No. 5 of 2015 *Republic v. Karisa Chengo & 2 Others* [2017] eKLR. The Supreme Court rendered itself as follows: -

[50] ... Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another.

(51)

(52) In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.

(79) It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a



reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).

27. The foregoing is the obtaining legal position.
28. The matter, however, did not end there. A further problem arose. It was on the cases raising ‘cross-cutting’ or ‘cocktail’ or ‘mixed grill’ issues within either Courts.
29. Initially there were two schools of thought in the High Court on the matter. One school favoured the ‘pre-dominant purpose test’ whereas the other school rooted for the ‘pre-dominant issue before Court test’.....
30. The proponents of the former include Ngugi, J who rendered himself in *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another* (2016) ECLR as follows: -
 23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
 24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.
31. Munyao, J was for the other test. In *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another* [2018] eCLR the Learned Judge argued as follows: -
 25. On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the



predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.

32. The Court of Appeal had an occasion and dealt with the issue. In *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others*, Civil Appeal No. 83 of 2016 [2017] eKLR, the Court dealt with the issue as follows: -

30 Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as *Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine)* which translates to 'whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell'. As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well...

31 Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it."

35 ...[F]or land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted.

33. The Court of Appeal, therefore, settled for the 'pre-dominant purpose test'..."

27. Turning now to the instant Petition, the Respondents Preliminary Objection specifically singled out certain factual accounts relied upon by the Petitioner to demonstrate that this Court lacks jurisdiction. At paragraph 7 and 8 of the written submissions, the Respondents argued that the Petitioner was accusing the Respondent of using criminal investigation to help the 6th and 7th Respondents advance their civil claim over construction of the Villa Franca Estate wall adjacent to L.R 3838/44 Villa Franca, and in the succeeding paragraph, petitioner had alleged that the 6th and 7th Respondent had violated Petitioners the right to property under Article 40 of the Constitution of Kenya. The Respondent thus submitted that the issues belong to ELC Court.



28. The Petitioner’s Advocate however maintained that the Petition challenges the abuse of the criminal process. At paragraph 6 of the submissions, he stated:

“...The Petition is about the respondents using criminal process improperly, unfairly, to misdirect it from its proper purpose, to use it for collateral purpose which the law does not recognize as legitimate use of process, use it for ulterior motive and to abuse the criminal process which the Honourable Court has a duty to intervene and put it to an end...”

29. Besides the above argument, the Petitioner’s Advocate submitted:

“In the first place that prayers (f) and (g) have been withdrawn with nothing left of it by filing a Notice of Withdrawal dated 22nd March, 2022”

30. I will address the issue of ‘withdrawal of the prayers’ in the Petition by ‘a notice of withdrawal.’ With due respect, that procedure is strange to this Court. To vary or alter a Pleading, whether by adding or subtracting the contents, or to clarify anything or make any corrections whatsoever in an already filed Petition or any pleading for that matter, the procedure is not to file a ‘notice of withdrawal’ of the unwanted portion in the pleading. The procedure is to seek leave to amend, particularly, as in the instant case where pleadings had closed. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 must have escaped the attention of Counsel for the Petitioner. The notice purporting to withdraw the two prayers from the Petition is of no effect as that process is fundamentally flawed.

31. May I now address the real issue at hand though I must begin by admitting that the Petition as pleaded is somewhat a hit-and- miss affair in terms of chronicle of facts. Be that as may, it is apparent to me that the essence of the Petition is not in the development by the 6th and the 7th Respondent. That might have been the trigger but is not the issue here. Rather, the focus of the instant Petition is the alleged misuse of criminal justice process which the Petitioners complain was employed to bully them through arrest, detention and the threat to prosecute them with the serious offence of robbery with violence in order to silence their opposition to the alleged actions of the 6th and 7th Respondent.

32. The nature of the complaint is thus alleged manipulation of the criminal justice process by unfairly employing it against them in order to assist the 6th and 7th respondents to subdue them into submission. The construction issue is only a piece in that factual matrix, it is not real issue in controversy in the Petition. The court has to determine if the arrest, detention and threat or prosecution was in the line with principles set out in Article 29, 49, 50 and 51 of the *Constitution*. The respondents will have an opportunity to demonstrate the lawfulness of their conduct or detention. These are Constitutional questions.

33. The issues raised in the Petition relate to observance of the Bill of Rights, accountability and impartiality by those charged with the enforcement of the law. It not about ownership and occupation of land or environmental matters as suggested by the Respondent. The issues in this petition thus squarely fall within the purview of this Court’s jurisdiction under Article 165 of the *Constitution*.

34. In the circumstances, I find no merit in the preliminary objection. It is hereby dismissed. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE, 2024.

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L N MUGAMBI



JUDGE

Constitutional Petition No. E054 of 2022 Page 9 of 9

