



REPUBLIC OF KENYA



KENYA LAW
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**Kuria & 70 others v Mirema High View Limited (Civil Case
5 of 2023) [2024] KEHC 8598 (KLR) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 5 OF 2023**

**HM NYAGA, J
JULY 15, 2024**

BETWEEN

JOSEPH MAINA KURIA 1ST PLAINTIFF
THOMAS MWANGI MUIRURI 2ND PLAINTIFF
DAVID MUGANE MWANGI 3RD PLAINTIFF
CECILIA WANENE KIBE 4TH PLAINTIFF
FRANCIS KARIUKI GATURA 5TH PLAINTIFF
PAUL KAMAU MURIITHI 6TH PLAINTIFF
STANLEY MBURU NGOTHO 7TH PLAINTIFF
JOHN NGIGI NYUMU 8TH PLAINTIFF
MARY NYAMBURA KAMAU 9TH PLAINTIFF
GRACE WANGARI KAMAU 10TH PLAINTIFF
JOHN KIBE MUTUA 11TH PLAINTIFF
RAYMOND KARIUKI GAKINYA 12TH PLAINTIFF
HEZEKIEL KIMEMIA KAHABI 13TH PLAINTIFF
STEPHEN NDEI THUO 14TH PLAINTIFF
JOHN GICHUHI NDUNGU 15TH PLAINTIFF
GEORGE NJENGA MUIRURI 16TH PLAINTIFF
JOHN KARU KINUTHIA 17TH PLAINTIFF
JOYCE WANJIKU MWANGI 18TH PLAINTIFF
SAMUEL GATHUKA KIMANI 19TH PLAINTIFF



SOSPETER KIHINGO WANGO	20 TH PLAINTIFF
AMOS WAWERU NDUNGU	21 ST PLAINTIFF
MERCY NYAKIO GATHUKA	22 ND PLAINTIFF
HARRISON KAGO MBEKIMANI	23 RD PLAINTIFF
LYDIA WAIRIMA KARURI	24 TH PLAINTIFF
PAULINE NYAMBURA NGANGA	25 TH PLAINTIFF
JOYCE WANJIKU MWANGI	26 TH PLAINTIFF
JOHN MUTURA NJUGUNA	27 TH PLAINTIFF
S.B MBIRITI KAHURA	28 TH PLAINTIFF
JAMES MWAURA KAMAU	29 TH PLAINTIFF
JAMES WAWERU GITURA	30 TH PLAINTIFF
FULL GOSPEL CHURCHES OF KENYA	31 ST PLAINTIFF
GEOFFREY NJUGUNA WANJOHI	32 ND PLAINTIFF
REBECCA WANGARI KINYANJUI	33 RD PLAINTIFF
FRANCIS MWANGI THUO	34 TH PLAINTIFF
PETER KINYANJUI NANGATHA	35 TH PLAINTIFF
SAMUEL GATHUKA KIMANI	36 TH PLAINTIFF
PATRICK KIMANI NGIGI	37 TH PLAINTIFF
JOSEPH RUGA KIRAGU	38 TH PLAINTIFF
NAFTALI KANGORO NDUNGU	39 TH PLAINTIFF
JAMES NGAROGA GICHIMU	40 TH PLAINTIFF
GITUYA MBURU	41 ST PLAINTIFF
NDUTA GICHINI	42 ND PLAINTIFF
LUCY WAMBUI NJOROGE	43 RD PLAINTIFF
ELIAS NGURE MURIITHI	44 TH PLAINTIFF
JAMES NYAGA GATHIRU	45 TH PLAINTIFF
JOHN NGUMO NGIMA	46 TH PLAINTIFF
LAWRENCE NGUGI MWANGI	47 TH PLAINTIFF
CHARLES KIBUI KIGO	48 TH PLAINTIFF
STEPHEN KIMANI MUCHIRI	49 TH PLAINTIFF
BENJAMIN NYUMU MUCHIRU	50 TH PLAINTIFF
LUCAS MUNGAI KAMAU	51 ST PLAINTIFF



ALEX MATHENGE WAGURA	52 ND PLAINTIFF
BONIFACE KANYINGI KAMAU	53 RD PLAINTIFF
VERONICA WAMBUI NJUGUNA	54 TH PLAINTIFF
LEAH NJAMBI MACHARIA	55 TH PLAINTIFF
SALOME WANJA MWANGI	56 TH PLAINTIFF
FRANCIS KIAGO WERU	57 TH PLAINTIFF
MONICAH MUTHONI MUGI	58 TH PLAINTIFF
GODFREY NJOROGE GITHINJI	59 TH PLAINTIFF
JULIAH WANGUI MWANGI	60 TH PLAINTIFF
JANE WANJIRU RIRIANI	61 ST PLAINTIFF
MARGARET WATEGI KAMAU	62 ND PLAINTIFF
PETER THUO KAMAU	63 RD PLAINTIFF
PETER THUO KAMAU	64 TH PLAINTIFF
MARY NJERI WAITHIRA	65 TH PLAINTIFF
TERESIA NJERI NJIHIA	66 TH PLAINTIFF
ESTHER WANJIKU GITAHU	67 TH PLAINTIFF
NANCY MUTHONI KIMATA	68 TH PLAINTIFF
REGINA NJERI MACHARIA	69 TH PLAINTIFF
JOHN NJANE THIONGO	70 TH PLAINTIFF
SAMUEL KARANJA KIMANI	71 ST PLAINTIFF

AND

MIREMA HIGH VIEW LIMITED DEFENDANT

JUDGMENT

Introduction

1. This matter was initially filed before the Environment and Land Court (ELC) in Nakuru in ELC Land Case No. 52 of 2021.
2. Pursuant to the said Court's orders issued on 22nd March, 2023, the matter was transferred to this court and it was assigned the case number herein.
3. When the parties appeared before me they informed the court that they had already complied with Order 11 of the Civil Procedure Rules in the ELC and so they sought a hearing date. The same was granted and the parties proceeded to tender their evidence.



Pleadings

4. The Plaintiffs vide a plaint dated 11th June,2021 sued the Defendant praying for judgement against it for: -
 - I. An Order for Specific Performance
 - II. General Damages
 - III. Costs of this suit.
 - IV. Any other relief that this court may deem fit and just to grant
 - V. Interest on (c) and (d) above.
5. The Plaintiffs pleaded that the Defendant is the registered owner of that Property known as L.R No. 1556/38 situate within Kayole area, Naivasha. That the defendant caused the sub-division of the aforementioned land parcel into numerous portions, each measuring approximately forty (40) feet by Eighty (80) feet and which properties were later referred to as Section 38.
6. They further averred that they entered into a sale agreement with the Defendant for purchase of the suit properties and in view of absence of title deeds the defendant issued Certificates to them affirming the sale thereof.
7. They pleaded that on the strength of the said Certificates they assumed possession of their respective land parcels.
8. They further asserted that it was the term of the sale agreements that the defendant shall avail all completion documents to enable them effect transfer in their favour upon payment of the full purchase price but despite paying the full purchase price the defendant has failed and/or neglected to release the completion documents.
9. In light of the above, they averred that the defendant has breached the terms of the sale of the suit properties.
10. Upon service of the plaint, the defendant filed statement of defence and counterclaim dated 13th October,2021 on 14th October,2021. The defendant denied the Plaintiffs' claim and averred that in the sale agreement between it and the plaintiffs, it was agreed that it would effect the transfers in favour of the plaintiffs at the Plaintiffs' own expense and as such the plaintiffs cannot purport to have performed their obligations as per the sale agreement when the expenses for transfer process remain unpaid to its detriment.
11. The defendant averred that despite the plaintiffs failing/neglecting to meet the expenses of the said transfer as agreed, it went ahead and initiated the transfer process and that this fact is within the Plaintiffs' knowledge as they have been allowed to view documentation in its custody and that there has always been communication between it and the plaintiffs' representative on the progress of registration of the transfers.
12. The defendant also averred that many of the initial purchasers who purchased some parcels from it went ahead and sold their parcels of land to other buyers thus disrupting the transfer processes as there were new owners.
13. It asserted that the transfer processes are currently at different stages as the plaintiffs bought parcels of land from it or from the initial owners at different times ranging between 2007-2019.



14. In its counterclaim, the defendant averred that the plaintiffs breached the terms of the sale agreements by failing to pay the transfer charges and that their nonparticipation in facilitating the transfers as agreed necessitated it to pay for the transfer charges up to the tune of Ksh. 4,342,718/=. The defendant thus prayed for the Plaintiffs suit to be dismissed with costs and judgement be entered against the plaintiff on counterclaim as follows: -
 - I. Breach of land sale agreement.
 - II. Special Damages amounting to Ksh. 4,342,718.
 - III. General Damages
 - IV. Costs of this suit
 - V. Interests at courts rate.
 - VI. Any other relief deemed fit to be granted by this Honourable Court.
15. The Plaintiffs through their reply to amended defence and counterclaim, reiterated that they were required to pay the purchase price and upon payment thereof the defendant was duty bound to issue them with completion documents to enable them effect transfer at their own costs.
16. The Plaintiffs further asserted that at the time they purchased the land the same had not been subdivided and that it was their common expectation that the Defendant would subdivide the land and avail titles and/or documents that would enable them transfer the land in their favour. They therefore prayed that the statement of defence and counterclaim be dismissed with costs and judgement entered as prayed in the plaint.

Evidence

Plaintiffs' Case

17. The second Plaintiff, Thomas Mwangi Muiruri testified on his behalf and on behalf of his co-plaintiffs. He stated that he had authority to testify on behalf of other plaintiffs. He reiterated the contents of the plaint and response to statement of defence and counterclaim in his testimony. Additionally, he testified that the defendant charged the suit title to Equity Bank without their knowledge and the discharge was done on 13th September,2018. He said the County Commissioner dealt with the issue and the defendant was asked to clear the loan. He said at the time of institution of this matter the defendant had not issued the titles and he saw them later. He asked that the defendant releases the documents to them to enable them register the land parcels in their respective names. He also relied on the documents listed in the bundle dated 2nd March,2023 and produced the documents therein as Exhibits Nos. 1 to 8.
18. In cross examination, he stated that the purchasers were to pay for the transfer and title while the seller was to subdivide the land. He disputed that he and co- purchasers breached the contract and stated that if the defendant had the title it should have given them to enable the transfer.

Defence case

19. James Karanja Mwaura a director of the Defendant testified on its behalf. He similarly reiterated the averments in the Defendant's statement of defence and counterclaim. it was his testimony that subdivision was done in 2006 and subdivision price started at Ksh. 80,000/= up to Ksh. 350,000/= per plot. He said clause 4 of the sale agreement provided that the purchasers would meet the title



- costs. He said the titles were obtained in 2022 and stated that he had titles for 44 plaintiffs. It was his testimony that the plaintiffs are supposed to pay the title costs then collect their respective titles like other purchasers who have done so and that as at 2022 the costs per title was Ksh. 80,000/= per plot.
20. In cross examination, he stated that they are two directors of the plaintiffs. Him and one Gibson Mwangi. He said there were 206 plots and that both of them were to sign the sale agreements. When he was referred to pages 89,90 and 105 of the plaintiffs' bundle he confirmed the same were signed by one director only. He said there were plots that he sold while some were sold by his partner. He stated that he only knew 44 purchasers whom he sold the plots to. He said he knew some purchasers purchased the plots from Gibson. He confirmed all the plots bore the name of the defendant. He said they maintained the record of purchasers and that when PW1 bought the land in the year 2007, the same had been subdivided on the ground but share certificates were prepared later. He said the agreement was to be completed in 3 months but the same was extended orally. He confirmed the defendant took the loan in the year 2007 and another one in 2008 and stated that the purchasers were informed, however, he did not have proof that the purchasers were made aware of the same. He said the titles were issued in 2022 when this matter was already in court.
 21. DW2 was Stanley Mungai Nyoike. He said he bought land from the defendant in 2009 at Ksh. 120,000/= and he was given a share certificate. He said he was supposed to pay further costs as he waited for the title and in 2022 he paid Ksh. 85,000/= and he was issued with a title in his name.
 22. In cross examination, he confirmed he did not have the sale agreement to confirm he purchased the plot from the defendant, he did not have a receipt to prove that he paid for the title and evidence that the title was registered in his name before court.

Plaintiff's Submissions

23. The Plaintiffs framed three issues for determination, namely: -
 - a. Who is responsible for the costs of subdivision and transfer?
 - b. Should the Court issue the Order for Specific Performance.
 - c. Should the Court Award General Damages to the Plaintiffs?
24. With respect to the first issue, the plaintiffs submitted that it is undisputed the defendant entered into various sale agreements with them and upon completion of payment, they were issued with share certificates and allowed to enter into and utilize the land. They argued that the terms of agreement affirmed that the land had not been sub-divided, the costs of sub-division was to be borne by the Defendant and they were to incur costs for the transfer of the plot from the Defendant to their respective names.
25. The Plaintiffs posited that the Defendant had in its possession the mother title and it was agreed that it would finalize the sub division process and avail titles capable of transfers. To this effect this court was referred to Clause 4 of the sale agreement.
26. The Plaintiffs argued that Clause 17 of the Law of Society Conditions of Sale (1989) is applicable considering most of these parcels were sold before the year 2015. The plaintiffs further argued that the pursuant to the provisions of Section 42 of the [Land Registration Act](#), the Proprietor has an obligation to subdivide land and duly register each subdivision.
27. The plaintiffs argued that as per the sale agreement they were required to cater for the costs of transfer and the agreement does not state that the said costs must be paid to the defendant but they may elect to do the transfer on their own or through a different entity as long as they bear the costs thereof.



28. In regards to the second issue, the plaintiffs cited the Court of Appeal Case of Bernard Ng'ang'a Ndirangu vs Samuel Wainaina Tiras [2019] eKLR for the proposition that Order for Specific Performance is an equitable remedy and discretionary, and argued that the evidence on record shows that they purchased the suit land from the defendant, have taken up occupation of their respective properties and thus the relief for specific performance is available.
29. Citing the cases of Peter Ndungu Njenga vs Sophia Watiri Ndungu (2000) eKLR, Ayoub vs Standard Bank of South Africa [1963] EA 619 at pp 622, 623 and Salesio M'itonga v M'ithara & 3 others (2015) eKLR, the Plaintiffs argued that they have established the creation of a constructive trust and specific performance should issue as they have occupied the suit land and constructed permanent houses and no action has been taken by the Defendant to stop occupation.
30. On the last issue, the plaintiffs urged this court to look at pages 21 and 22 of their bundle specifically numbers 4,5,6,7 and 8 that show that in 2006 the suit land was registered in the name of the Defendant. They submitted that the completion date as per the sale agreement was 90 days and despite the defendant receiving the purchase price from them and promising to issue title deeds to them, it proceeded to take a loan from Equity Bank in 2007 and a further loan in 2010 and the evidence shows the property was discharged in the year 2018. From the foregoing, the plaintiffs contended that it is abundantly clear that the delay in finalizing the subdivision process and issuance of completion documents is attributable to the defendant and as such General Damages must be awarded to them.
31. The plaintiffs posited that the Defendant's attribution of delay on the reselling of respective portions by them, is inaccurate, as the sale to others could not interfere with the process of Subdivision. To bolster their case, the plaintiffs placed reliance on the case of Millicent Perpetua Atieno vs Louis Onyango Otieno [2013] eKLR on the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

Defendant's Submissions

32. The Defendant framed two issues for determination. Namely;
 1. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
 2. Who should bear the costs of this suit?
32. On the first issue, the Defendant submitted in the Negative. It posited that the Plaintiff is defective in nature as it pleads for specific performance in respect to the suit properties. The defendant submitted that in the process of acquiring the certificate of titles of the 200 parcels of land, it came to its attention that the plaintiff had initiated a parallel transfer process which frustrated the entire process. That notwithstanding, it is willing to issue each purchaser with a certificate of title upon payment of all transactions for transfers and title costs in compliance with Subsection 4 of the said agreement.
33. The Defendant posited that Specific performance is an equitable relief and a party seeking it must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. In buttressing this position, reliance was placed on the case of *Gurdev Singh Birdi & Marinder Singh Ghatora vs Abubakar Madhubuti, the Court of Appeal in Civil Appeal No. 165 of 1996.*
34. In view of the above, the defendant argued that the plaintiff's case in ELC No. 52 of 2021 was dismissed as it had fully complied with the terms of the agreement and the prayer for specific performance had been overtaken by events.



35. The Defendant argued that plaintiff on their part failed to pay the title costs and transfer charges as per the terms of the Agreement which resulted in breach of the contract. To this end, the defendant referred this court to the Black's Law Dictionary on the definition of a breach of contract and compensatory nature of breach of contract as was highlighted by Lord Diplock in Photo Production Ltd. vs Securicor Transport Ltd. [1980] 1 All E.R. 556
36. The Defendant further argued that the matters raised in the Plaintiff's pleadings are predominantly on the sale of land and therefore this court lacks jurisdiction to hear and determine the same. The Defendant posited that jurisdiction is a fundamental prerequisite to any court process. To this end, it made reference to the Court of Appeal Case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1.
37. With respect to the second issue, the Defendant submitted that the court has wide discretion to award costs and fix the interests rate thereof judiciously. It further submitted that the suit herein lacks merit on account that this court lacks jurisdiction and the prayer for specific performance has been overtaken by events.
38. To buttress its submission, the defendant cited the case of Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others [2013] eKLR for the proposition that costs are discretionary and awardable to the successful party.
39. In the end, the Defendant prayed that the suit be entirely dismissed with costs.

Analysis and Determination

32. Having reviewed the Pleadings, evidence of the parties and the Submissions filed, the following are the issues I discern that arise for determination: -
 - a. Whether this court has jurisdiction to determine this matter.
 - b. Who was to cater for the costs incurred on transfer of the parcels of land?
 - c. Whether the Defendant breached the sale agreement terms.
 - d. Whether plaintiffs are entitled to the prayers sought in the plaint.
 - e. Whether the Defendant is entitled to the orders sought in the Counterclaim.
33. Needless to state, if the court is to find that it has no jurisdiction, then it will be an exercise in futility to look at the other issues.
34. The suit in question involves a parcel of land whose description has been given herein.
35. As has been stated, when the parties appeared before the Environment and Land Court at Nakuru, the Judge found that the issues that were framed before her were outside the jurisdiction of the said court and so she ordered that the file be transferred to this court. The defendants had informed the said court that they wanted the suit withdrawn or transferred to the Chief Magistrates' Court. The plaintiffs were of the opinion that the suit be transferred to this court.
36. The strange thing about this suit is that when the parties submitted before this court, the issue of jurisdiction was raised by the defendants/counter-claimants. This is despite the fact they went ahead to tender evidence herein.
37. Despite the above the court cannot ignore the question of jurisdiction. It is well known that jurisdiction is everything. Without it, a court cannot give any lawful orders.



38. The Supreme Court of Kenya, in the case of Nasra Ibrahim Ibren vs Independent Electoral and Boundaries Commission & 2 Others Supreme Court Petition No. 19 of 2018 stressed the fact that jurisdiction is everything and that a court may raise a jurisdictional issue suo motu. It was held that: -

“A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus: “What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...”

39. Thus this court has a duty to satisfy itself that it has the requisite jurisdiction to entertain this matter, even though the parties had already testified.

40. It is apparent from the record that when the parties’ Advocates/Representatives appeared before the Environment and Land Court (ELC) concurred that the matter did not fall within the Jurisdiction of the ELC. The Plaintiffs’ counsel asked the court to transfer this matter to this court while the Defendant’s counsel asked that the matter be transferred to the Chief Magistrates Court. The court in its orders stated as follows: -

“After asking the parties to file their list of issues and upon consultation with them, both parties and the court agree that the issues pending for determination do not fall with the subject matter jurisdiction of this Court. Counsel for the Plaintiff has asked that the suit be transferred to the High Court as it falls within the Pecuniary and subject matter jurisdiction of that court. Consequently, I hereby transfer the suit to the High Court of Kenya sitting at Nakuru...”

41. Even though the suit was transferred to this court, this court has the duty to determine if it has the requisite jurisdiction to entertain it, albeit a little late in the day. Whatever the stage that the suit has reached, before the final decision is made, the issue is whether this court has jurisdiction or not can be addressed.

42. The Court of Appeal in Jamal Salim vs Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

“Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”



43. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others* (2013) eKLR stated that: -

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain.”

44. On the same issue of jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & others* (2012) eKLR stated 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 counsels 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 ... 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.”

45. The High Court’s jurisdiction is as set out under Article 165 of *the Constitution*. The limitation of this court’s powers is provided for under Sub-Article (5) thereof which states that the High Court shall not have jurisdiction in respect of matters: -

- “(a)
(b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b).”

46. Article 162 of *the Constitution* provide as follows: -

- “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).
(2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—
(a) and
(b) the environment and the use and occupation of, and title to, land.
Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)”.



47. In compliance with *the Constitution*, the *Environment and Land Court Act* was enacted. At section 13, the Act provides 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.
- (7) 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;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs”

48. As is clearly set out in the Act, the ELC has both original and appellate jurisdiction to hear matters relating to land and environment.



49. There may be instances where the parties raise issues that cut across the jurisdiction of both courts. In that case, initially, there were two schools of thought. One school favoured the so-called ‘pre-dominant purpose test’ whereas the other school rooted for the so-called ‘pre-dorminant issue before Court test’.
50. One such proponent of the former J. Ngugi, J (as he then was) rendered himself in *Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another* (2016) ECLR as follows: -

“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.

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.”

51. Munyao, J rooted for the other test. In *Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited & Another* [2018] eCLR the Learned Judge argued as follows: -

“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.”

52. The Court of Appeal had an occasion and dealt with the same issue, in the case of *Co-operative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others* [2017] eCLR. The Court stated 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.”

53. The Court of Appeal, therefore, settled for the ‘pre-dominant purpose test’. The decision of the said court binds this court and therefore, that is the test I will use in this case.
54. Having looked at the pleadings filed, and even the submissions filed by the parties, I am of the view that the orders sought by the plaintiffs only be granted by the ELC. The agreements referred to by the parties relate to sale of land, and the court in determining whether or not to grant the orders sought will have determine the validity of the sale agreement and the terms and conditions therein. Although the orders sought by the defendants in the counterclaim can be handled by this court if they are on their own, their determination cannot be severed from the sale agreements in question and the claims by the plaintiffs. The respective claims are like Siamese twins, who cannot be separated lest they all perish.
55. Therefore, applying the pre-dominant purpose test, I am of the view that this is a case that ought to have been handled by the ELC. I say so with tremendous respect to the court of equal status that transferred the suit here. The ELC could not cloth this court with jurisdiction that it does not possess. Neither can the parties even by consent, bequeath this court such jurisdiction.
56. In my opinion, in proceeding with this matter, this court will be in contravention of the Constitution and the said Act. The demarcation of jurisdiction between this court and the ELC is very clear.
57. To buttress this point, I will refer to the decision in Republic vs Chief Land Registrar & another [2019] eKLR where the court held as follows;

“The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act. In this regard, my view is that the intention of the Constitution is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction. My strong view is that this suit ought to have been transferred to the proper court the moment the Constitution of Kenya 2010 divested this court the jurisdiction to hear the case. Buttressed by the provisions of the Constitution and section 13 of the Environment and Land Court Act, [15] I am clear in my mind that this court cannot properly entertain the application before me. <http://www.kenyalaw.org> - Page 4/16 Republic v Chief Land Registrar & another [2019] eKLR. It is beyond argument that a High Court may not determine matters falling squarely under the jurisdiction of the Employment and Labour Relations Court and the Land and Environment Court, whether it is a substantive hearing or an application such as the instant application. Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of the application before me. A boundary dispute or enforcing an order relating to a boundary dispute falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of the Constitution were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status. Where the constitution and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction is



inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under *the Constitution*.”

58. Having found that the case herein falls squarely under the Jurisdiction of the ELC, so what happens next?
59. A court without jurisdiction cannot take any further step. It will be an act in vanity. It was held in; *Adero Adero & another vs Ulinzi Sacco Society Ltd [2002] eKLR* that
- “it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal. Having taken the view that this court had no jurisdiction to entertain the matter, it follows that it could not transfer the same to another court. In that regard it is trite law that where a cause is filed in court without jurisdiction, there is no power in that court to transfer it to a court of competent jurisdiction.
60. Ordinarily, once a court finds that it has no jurisdiction, then the next course is to strike out the suit. However, I am mindful of the position of the parties herein, especially the plaintiffs, who had approached the ELC seeking the orders sought. They now find themselves on no man’s land so to speak.
61. Curiously, the defendants urge the court to strike out the suit for want of jurisdiction but do not state what this court should do in respect to their counter-claim. Do they also want their claim struck out as well?
62. As I have stated the two claims cannot be severed. Striking out the suit would have grave consequences for either party and the dispute between them would not have been resolved.
63. So what is this court to do, given the peculiar circumstances of this case?
64. There would be no issue if the first transfer was from this court to the ELC. The court would have transferred the suit to the ELC. Matters are complicated by the fact that it is the ELC that first transferred the suit to this court.
65. Can this court, then, re-transfer the suit back to the ELC? What would happen if upon such re-transfer, the ELC determines, as it did earlier, that the matter ought to be heard by this court? Can it do the same thing again? And if it does that, can this court transfer the suit again? Is such a ping pong situation envisaged by the law?
66. These are the questions that I have had to ask myself over and over, bearing in mind that the parties must have a resolution to their dispute.
67. Whereas the defendants addressed me on the issue of jurisdiction, the plaintiffs did not, based on the assumption that this court had jurisdiction. It would thus be only fair that they be given a chance to address the court on the issue and the findings above.
68. Therefore I direct that the parties do proceed to address the court as above then I will give final orders.

DATED, SIGNED AND DELIVERED AT NAKURU 15TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.



In the presence of;

Court Assistant Jeniffer

Mr. Wairegi for plaintiffs

Mr. Muriuki for Defendants

