



**Awino & another v Nairobi County Executive Committee Member for  
Physical and Land Use Planning & 9 others (Petition E009 of 2022)  
[2024] KEHC 12085 (KLR) (Constitutional and Human Rights) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E009 OF 2022**

**LN MUGAMBI, J**

**OCTOBER 9, 2024**

**BETWEEN**

**FRANCIS AWINO ..... 1<sup>ST</sup> PETITIONER**

**NGUGI MBUGUA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NAIROBI COUNTY EXECUTIVE COMMITTEE MEMBER FOR PHYSICAL  
AND LAND USE PLANNING ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI COUNTY EXECUTIVE COMMITTEE MEMBER FOR  
TRANSPORT ..... 2<sup>ND</sup> RESPONDENT**

**GOVERNOR, NAIROBI CITY COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR GENERAL, NATIONAL TRANSPORT AND SAFETY  
AUTHORITY (NTSA) ..... 4<sup>TH</sup> RESPONDENT**

**PRINCIPAL SECRETARY, STATE DEPARTMENT FOR TRANSPORT .... 5<sup>TH</sup>  
RESPONDENT**

**SECRETARY, NATIONAL LAND COMMISSION ..... 6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**YARE TOWERS ..... 8<sup>TH</sup> RESPONDENT**

**STAGE COACH INTERNATIONAL SERVICES ..... 9<sup>TH</sup> RESPONDENT**

**INTERNATIONAL HOTELS (K) LTD ..... 10<sup>TH</sup> RESPONDENT**



## RULING

1. This ruling is in respect of the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents' Notice of Preliminary Objection dated 7<sup>th</sup> March 2022 to the amended Petition dated 23<sup>rd</sup> February 2022. It is premised on the grounds that:
  - i. This Court lacks the requisite jurisdiction to handle the matter as per the provisions of Article 165(5)(b) as read together with Article 162(2) (b) of *the Constitution*.
  - ii. The orders sought may not be issued being orders that violate the decisional independence of the County Government.
  - iii. The Petition is entirely premised on inadmissible evidence and conjecture.
  - iv. The Petition is incurably defective in substance and in form.

### 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents' Submissions

2. The 7<sup>th</sup> Respondent through Senior State Counsel Macheso Dan Weche filed submissions dated 3<sup>rd</sup> March 2023 in support of their Preliminary Objection. The 4<sup>th</sup> Respondent who did not file a response or submissions associated itself with these Respondents submissions. Two issues were raised for determination. First whether this Court has jurisdiction to handle the matter and second whether the orders sought violate the decisional independence of the County Government.
3. On the first issue, Counsel relying on Owners of Motor Vesel Lilian 'S' v Caltex Kenya Limited (1989) KLR 1 submitted that this Court lacks jurisdiction to entertain this matter. This is since the Petition concerns the use and management of public land. This jurisdiction is argued to be vested in the Environment and Land Court under Article 162(2) (b) as read with Section 13 of the *Environment and Land Court Act*.
4. Reliance was placed in Republic vs Karisa Chengo and 2 others (2017) eKLR where the Supreme Court pronounced that:

“...It follows that 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 follows that the Judges appointed to those courts exercise varying jurisdictions, depending upon the particular courts to which they were appointed.”
5. Like dependence was also placed in Eric Wambua Muli and another v Prime Bank Limited and 3 others (2017) eKLR.
6. Turning to the second issue, Counsel submitted that the orders sought, seek to violate the decisional independence of the County Government contrary to Article 175(a) of *the Constitution* as read with Section 11 of the *Urban Areas and Cities Act*.
7. Further reliance was placed in Mumo Matemu v Trusted Society of Huan Rights Alliance and 5 others (2013) eKLR where it was held that:

“...separation of power does not only proscribe organs pf government from interfering with other functions. It also entails empowering each organ of government with countervailing powers which provides checks and balances on action taken by other organs of government.



Such powers are however not a license to take over the functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function.”

### **Petitioners’ Submissions**

8. In response, the Petitioners filed submissions dated 14<sup>th</sup> March 2023 in response and sought to equally discuss the two issues as raised by the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents’.
9. On jurisdiction, relying on the opine in the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & others (Case CCT 64/08 (2009) ZACC), they submitted that jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case.
10. Similar reliance was placed in *Republic vs Magistrates’ Court; Absin Synergy Limited (Interested Party) (Judicial Review E033 of 2021)* (2022) KEHC 10(KLR) (24 January 2022) (Judgment), Equity Bank Limited vs West Link Mbo Limited (2013) eKLR, Board of Governors, Moi High School, Kabarak and another vs Malcom Bell(2013) eKLR and Martin Luther Mc Were v James Mabango Ambundo(2022) eKLR.
11. According to the Petitioners, the predominant issue in the Petition safeguarding the cited constitutional freedoms and rights of the residents of Nairobi that continue to be violated by the Respondents.
12. On the second issue, echoing their line of argument it was submitted that the Petition primary concern is protecting the rights of Nairobi residents against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents maladministration of the public transport sector which is marred by irrationality, impropriety and illegality.
13. The orders will thus be directed at addressing unlawful acts and omissions. Accordingly, the Petitioner contended that this Court has the requisite jurisdiction to entertain the matter.

### **1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents’ Case**

14. These Respondents response and submissions were neither in the Court file or Court’s Online Portal (CTS).

### **Analysis and Determination**

15. Having considered the pleadings and submissions of the parties herein, the issues that arise for determination in my view are:
  - i. Whether the Preliminary Objection dated 7<sup>th</sup> March 2022 has met the requisite threshold.
  - ii. If so, whether the Preliminary Objection is merited.
16. The threshold of a preliminary objection was set out by the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”
17. The Court went further to note that:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the



exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

18. Likewise, the Court in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR noted that:

“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. Equally, in *Oraro vs. Mbaja* [2005] 1 KLR on the nature of preliminary objections it was observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

20. The preliminary objection in this matter is premised on the ground that this Court lacks jurisdiction. A jurisdictional question is a matter of law.

21. The Supreme Court addressing its mind on the issue of jurisdiction in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others* (2012) eKLR opined 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.”

22. The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents contend that the scope of this Petition is a matter that lies within the competence of special courts under Article 162(2) (b) of *the Constitution* and not the High Court.



23. The Petitioners opposed that view and insisted that the matters addressed in the Petition relate to violation of fundamental rights and freedoms which falls within the jurisdiction the High Court.
24. Article 162(2)(b) of *the Constitution* provides as follows:
- i. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
  - ii. 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.
  - iii. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
25. The Parliament as empowered by Article 162 of *the Constitution* enacted the *Environment and Land Court Act* No.19 of 2011 which deals exclusively with matters falling within its ambit. The Jurisdiction of the Court is defined in Section 13 of the Act as follows:

In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—

- i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - ii. relating to compulsory acquisition of land;
  - iii. relating to land administration and management;
  - iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - v. Any other dispute relating to environment and land.
26. It is clear that the High Court has wide jurisdiction to entertain matters including questions relating to *the Constitution* and the Bill of Rights under Article 165(3) (d) of *the Constitution*. However, Article 165 (5) limits the High Court’s jurisdiction as follows:

The High Court shall not have jurisdiction in respect of matters-

- i. Reserved for the exclusive jurisdiction of the Supreme Court Under this Constitution; or
  - vi. Falling within the jurisdiction of the Courts contemplated in Article 162(2).
27. The Supreme Court *Republic vs Karisa Chengo & 2 others* (supra) delivered a landmark decision concerning the jurisdiction of Special Courts under Article 162 vis-à-vis the High Court as follows:

“[50] It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of *the Constitution* intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the



present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another. In their words:

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

(51) Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions...”

28. The Court went on to further state:

“...[52] ...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.”

29. In matters that are characterized by cross - cutting issues between the High Court and Environment and Land Court, Courts have also pronounced themselves on such matters when it comes to assumption of jurisdiction. In *Benson Makori Makworo v Nairobi Metropolitan Services & 2 others (2022)eKLR* borrowing from the Supreme Court and the Court of Appeal pronouncements over this conflict, the Court held:

“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 vs Redhill Heights Investments Limited & Another (2016) EKLR* 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] eKLR 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’. Therefore, that is the test I will use in this case.”

30. A closer scrutiny of this Petition discloses that the Petitioners’ case is hinged on the following grounds and constitutional violations:

- i. That the 1<sup>st</sup> Respondent has contributed to the public transport crisis in Nairobi City County by both acts of commission and omission.
- ii. That the 1<sup>st</sup> Respondent is bound by Article 66 of *the Constitution* 2010 to regulate use of land in Nairobi City County in the interest of land use planning inter alia. This is buttressed by statute in both the *Physical and Land Use Planning Act*, 2019 and *County Governments Act*, 2012.
- iii. That the 1<sup>st</sup> Respondent has ignored the principles and norms of physical and land use planning by failing to plan for public transport contrary to Section 5 (f) of the *Physical And Land Use Planning Act*, 2019.
- iv. That the 1<sup>st</sup> Respondent, the Chairperson of the County Physical and Land Use Planning Consultative forum vide Section 14 (2) (a) whose function is to promote effective coordination and integration of physical and land use development and sector planning vide Section 15 (b) both of the *Physical And Land Use Planning Act* 2019, which places the 1<sup>st</sup> Respondent at the interface of land use needs of the public transport sector.
- v. That the 1<sup>st</sup> Respondent is responsible for promoting the integration of county physical and land use planning functions and sectoral planning levels, giving the 1<sup>st</sup> Respondent a pivotal position in addressing land use needs of the public transport sector as per Section 17 (b) of the *Physical And Land Use Planning Act*, 2019.
- vi. That the 1<sup>st</sup> Respondent has frustrated the purpose and objects of a county physical and land use development plan by failing to improve transport and communication networks and linkages as Section 37 (g) of the *Physical And Land Use Planning Act*, 2019 intended.
- vii. That the 1<sup>st</sup> Respondent has neutered the objective of harmonizing the development of county communication system, infrastructure and related services in county planning as intended by Section 103 ( d) of the *County Governments Act*, 2012.
- viii. That the 1<sup>st</sup> Respondent has failed to develop, publish and widely disseminate a city county wide spatial development plan as repeatedly stressed by Sections 107 (c), Section 110 and Section 111 of the *County Governments Act*, 2012.
- ix. That the 1<sup>st</sup> Respondent has failed to develop, publish and widely circulate a city development plan reflecting a spatial development framework which includes provision of basic guidelines for land use management system of the city as Section 40 of the *Urban Areas and Cities Act*, 2011 intended.
- x. That the land parcels L.R. Nos. 36NII/56, 36NII/422, & 36/VII/421 commonly referred to as ‘the Garage’ was the depot/termini for Nairobi City buses.
- xi. That the land parcels LR. Nos. 209/2655 & 209/6527 were the central bus station for Nairobi City.



- xii. That the lands parcels in k) and l) above are necessary for optimum siting of transport infrastructure.
  - xiii. That the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents are on public land necessary for public purposes.
  - xiv. That the 3<sup>rd</sup> Respondent provides leadership for the county governance and development, to the county executive committee and administration based on the county policies & plans and promotes the county's competitiveness vide Section 30 (3) (a), (b), & (e) of the County Governments Act, 2012.
  - xv. That the 6<sup>th</sup> Respondent has not exercised statutory initiative of reviewing the grant and disposition of LR. Nos. 36NII/56, 36/VII/422, 36/VII/421, 209/6527, & 209/2655 contrary to Section 14 (1) of the National Land Commission Act, 2012.
  - xvi. That the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents are bound by Articles 10, 73, 75, and 232 in execution of duty.
31. It is apparent that the Petitioners' alleged violation of their constitutional rights stems from the Respondent's use of land. Applying the pre-dominant purpose test takes us to the substratum of the Petition which points to a grievance on land use planning, land management and administration the consequential effect being the violation of the Petitioners rights. This fact is manifest from the even from Petitioners' anchoring Statutes that are enumerated in the preamble to the Petition and the reliefs sought.
32. Given that the use of the land is the genesis of the alleged violation of constitutional rights of the Petitioners, it is the Environment and Land Court which has the jurisdiction to adjudicate violation of constitutional rights that stem from its jurisdiction. I thus come to the conclusion that it is Environment and Land Court as established under Article 162(2) (b) of the Constitution which has jurisdiction over this matter.
33. I uphold the preliminary objection and struck out this Petition. I make no orders as to costs as it is a public interest litigation.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> OCTOBER, 2024.**

**L N MUGAMBI**

**JUDGE**

