



**Afrison Export Import Limited & another v National Land Commission & 5 others;
Cabinet Secretary for Education & 4 others (Interested Parties) (Constitutional
Petition 343 of 2019) [2023] KEHC 1706 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL PETITION 343 OF 2019
DKN MAGARE, J
MARCH 10, 2023**

BETWEEN

AFRISON EXPORT IMPORT LIMITED 1ST PETITIONER

HUELANDS LIMITED 2ND PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 5TH RESPONDENT

ETHICS & ANTI CORRUPTION COMMISSION 6TH RESPONDENT

AND

CABINET SECRETARY FOR EDUCATION INTERESTED PARTY

**CABINET SECRETAY FOR LANDS & PHYSICAL PLANNING OFFICIAL
RECEIVER INTERESTED PARTY**

CONTINENTAL CREDIT FINANCE LIMITED INTERESTED PARTY

CHIEF LAND REGISTRAR INTERESTED PARTY

DIRECTOR OF SURVEY INTERESTED PARTY



RULING

1. The Petitioner filed this petition claiming the following prayers: -
 - a. A declaration that the Respondents have violated the petitioners' entitlements, rights and fundamental freedoms under articles 10,9, 21, 25, 27, 29, 31(1), 35(2), 40 and 47 courtesy of effective compulsory acquisition of the petitioner's property in respect of LR 7879/ 25, and by their subsequent occupation, use disposal and offer of the suit property to third parties.
 - b. General damages for violation of the petitioner's rights and fundamental freedoms with respect to the dealings and actions against the petitioner's over LR No. 7879/25, which is part of LR 7879/4
 - c. An order for compensation of Kshs 13,600,000,000.00, being loss of rental income, plus accrued interest thereon and user of the suit property.
 - d. An order compelling the Respondents to compensate the petitioner a sum of Kshs 22,300,000,000.00 being the market value of the petitioner's property namely LR No. 7879/25, which is part of LR 7879/4.
 - e. A set off for a sum of Kshs 1,500,000,000.00 in respect of payment over the 13.5364 acres of the suit property occupied by Ruaraka High school and drive in primary school, being monies already received as part compensation subject to the outcome of civil appeal no. 303 of 2019.
2. The rest of the prayers have no significance now. Except prayer (e), the rest of the prayers touches on occupation and user of LR No. 7879/25, which is part of LR 7879/4. Even no. (e) deals with Part of LR 7879/4 but compensation already paid.
3. The Respondent filed various grounds of opposition which were essentially notices to raise preliminary Objections. At some stage the Court ordered that the Preliminary Objection be heard as a priority. This appears to have been abandoned along the way when an application to strike out the petition was filed.
4. There were also some directions that the joining of the then proposed first interested party was to be dealt with after the Preliminary Objection. Subsequently parties took different directions for hearing of the Preliminary Objection and an application dated 18th November, 2021 together. The parties filed submissions which I have had the occasion of thoroughly perusing.
5. The parties anticipated closure and I am not likely to disappoint. These submissions are fairly detailed and some parties abandoned some of the objections. On 18th January, 2023 the parties opted for highlighting. However, the parties were apparently not ready but nevertheless highlighted.
6. The Court specifically put one question to the Petitioners and that is, "what is the subject matter wherein the applicant confirmed, that the issue was a dispute of constructive compulsory acquisition LR No. 7879/25. The main point of contention appears to be the Jurisdiction of the Court.
7. The following therefore are the issues that emerge for determination: -
 - a. Whether this Court has jurisdiction to hear and determine this matter.
 - b. What reliefs commend themselves to the parties.
 - c. Who is to bear costs.



Jurisdiction of the Court

8. This Court is established under Article 165 of *the Constitution* with specific duties assigned to the Court. However, under Article 165(5) *the Constitution* prohibits the High Court from dealing with matters which are within the exclusive competence of Courts contemplated under Article 162 of *the Constitution*.

162. The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

9. Article 162 establishes the Environment & Land Court with jurisdiction to deal with environment and use and occupation of and title to land. To be able to demonstrate whether the Court has to determine the subject matter of the petition. It looks at the subject matter and not just prayers sought.

10. In *Mohamed Ali Baadi and others v Attorney General & 11 others*[2018] eKLR, the court stated as follows: -

100. The Supreme Court in *Republic vs Karisa Chengo & 2 Others*^[47] amplified and pertinently held that each of the Superior Courts established by or under *the Constitution* has jurisdiction only over matters exclusively reserved to it by *the Constitution* or by a statute as permitted by *the Constitution*. The holding in this case however, does not resolve the knotted question of which court among the High Court and the two equal status Courts under Article 162(2)(b) should be seized of jurisdiction in controversies in hybrid cases. Hybrid cases are cases where issues cut across the exclusive jurisdiction reserved for each of the three courts. As demonstrated by the issues identified above, this is one such hybrid case

11. The court continued that in cases of maze issues or denial of rights, then the high court has jurisdiction as well as the courts of equal status, the court stated: -

“ 103. After a wide-ranging analysis and consideration of the applicable provisions of *the Constitution* and in particular, Articles 165(3), 162(2) and (3), and section 13 of the *Environment and Land Court Act*, and the amendments thereto, the five Judge Bench of the High Court held as follows: –

In its strict sense the “jurisdiction” of a Court refers to the matters the Court as an organ not an individual was competent to deal with and reliefs it was capable of granting. Courts were competent to deal with matters that the instrument, be it *the Constitution* or a piece of legislation, creating them empowered them to deal with. Such jurisdiction could be limited expressly or impliedly by the instrument creating the Court.

The jurisdiction of the High Court was unlimited save only as provided by *the Constitution*. The High Court had express jurisdiction to deal with and determine matters of a Constitutional nature under article 165(3) of *the Constitution*. Indeed, while the Constitutional claw back was found under article 165(5), article 165(3) (e) of *the Constitution* further confirmed that the



High Court's jurisdiction could be extended further pursuant to any statutory provision. For example, the *Judicature Act* which conferred the specialized admiralty jurisdiction. *The Constitution* however did not provide for any other written law to limit the jurisdiction of the High Court.

Both the High Court and the ELC Court had a concurrent and or coordinate jurisdiction and could determine Constitutional matters when raised and do touch on the environment and land. Neither *the Constitution* nor the ELC Act limited the High Court's jurisdiction in that respect

A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions had been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents.

12. In *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR,

“Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

13. Jurisdiction is the authority to decide therefore, where the Court has jurisdiction it must take, jurisdiction while where it has no jurisdiction it must down its tools. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA (as then he was) stated as doth: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these



characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

14. The Supreme Court has had an opportunity in numerous occasions and it has never squandered such to clarify the extent of jurisdiction of this Court and Courts of equal status. In Republic v Karisa Chengo & 2 others [2017] eKLR, the supreme court posited as doth: -

“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).”

15. In Re-Interim Election Commission Petition No. 2 of 2011, the Supreme Court rendered itself as doth: -

[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.

16. The supreme court succinctly continued to require, nay demand that *the constitution* be interpreted in Manner that promotes the rule of law and holistic interpretation of *the constitution*. In the case of in



the Matter of Interim Independent Electoral Commission [2011] eKLR. The supreme court posited as doth: -

86] In common with other final Courts in The Commonwealth, Kenya's Supreme Court is not bound by its decisions, even though we must remain alive to the need for certainty in the law. The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). *The Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

17. In *S.K Macharia V KCB*, the Supreme Court, the Court was particular that there must be jurisdiction and the same cannot be conferred by consent by connivance or by craft. The Court was precise and held as doth: -

“As held in the matter of Advisory opinion of the Court under Article 163 of the Constitutional Petition No. 2 of 2011 at para 30, the Court stated, “A Court may not arrogate itself jurisdiction through craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where legislation is clear and there is no ambiguity.”

18. On the other hand, also the Court cannot by sheer laziness or dislike for a file divest itself of jurisdiction that it has. In support of that contention, Justice Nyarangi quoted in *Motor Vessel*, 1989eKLR Lilian S. Justice Nyarangi JA laid with approval words and phrases legally defined – Vol 3: I to N page 113.

“By Jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute Charter or Commission under which the Court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to which jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction is an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the Court or tribunal has been given the power to determine conclusively whether the facts exist. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing jurisdiction must be acquired before judgment is given.”

19. This matter came before me during the Rapid Results Initiative. The parties had initially indicated they needed three hours to highlight. likely they used 5 minutes each. Reading and Responses the Petition I get an impression that not the entire dispute is before me. Nevertheless, I have to deal with what parties have placed before me.



The Pleadings

20. The Petitioner filed 9 to page petition which I have painstakingly read together with the Petitioner there is a 14 page supporting Affidavit dated 28th August, 2019. The bulk found petition is supported by annexure Ruling from FM1 to FM 23 which starts at page 439 ending of page 44.
21. The first annexure is an indenture made on 29th December, 1981 between Joreth Limited and Afrison Export Import Ltd and Hueland Limited. This is followed by a certificate of Postal search as on 7th August, 2018 indicating that Afrison Export Import Ltd and Huelands Ltd are tenants in common for Land Reference No. LR 7879/4 measuring 96 acres. On the face of the search there are encumbrances, some of which will become pertinent in the decision as hand.
22. The first encumbrances is a mortgage dated 29th December, 1991 to continent Credit Finance for Kshs.21, 000, 000/=.
23. The second is a mortgage dated 11th July, 1986 to KPLC for Kshs.165, 000, 000/= these is a caveat by Registrar of Government Lands dated 1st March, 2018 claiming an interest under Section 76 of its *Land Registration Act*, 2012. Those are also notices by the National Land Commission to acquire 2726 vide gazette notice of 29th August, 2014. 1319 hectares vide gazette notice No. 5885 of 29th July, 2016 Gazette Notice No. 6322 of 30th June, 2017 to acquire 2.8255 ha, 2.7472 and 1.198 ha. It was referencing a letter dated 14th May, 2018. A mortgage to Continental Credit dated 29th December, 1981, Agreement with KPTC for sale of maisonettes. There are various Sale Agreements.
24. At FM 7 there is a Judgment of the Court, in Milimani HCCC 617 of 2012 over land parcel No. 7879/24. The Judgment covers 37.4 acres, comprised in the above title which was reported part of the larger LR 7879/4 measuring 96 Acres. The same dealt with paragraph 2 of the Judgment reads as follows: -

“It would seem that in or about 1988, the Government of Kenya took possession of the said property for and on behalf the General Service Unit (GSU) of the Kenya Public Service. The Plaintiffs who are the registered owners of this suit property have never began compensated for the loss of the use of the suit property. Justice Mabeya, made a decision on 12th February, 2012 finding that 37.4 acres comprised in land parcel No. 7879/24 and compensation is due for theproperty. The Court declined to grant the prayer for compensation for the period the government has been in occupation the Court stated at para 8 “
25. The Court gave reasonable compensation for the suit property, being the mean value of three valuers at Kshs.4,086,683,330/=. He awarded the claimants costs.
26. There annexed to the petition, other correspondences over the decision made by Justice Mabeya. There appears to have been an agreement for 2.7 m as per the letter marked FM 8 (a) dated 18th March, 2013.
27. FM 9 a & b is the subdivision deed that gave rise to LR 7879/24 and LR 7979/25 FM 10 & 11 are Acquisition Gazette Notice, referred in annexure FM 2 and various minutes.
28. Further, the Petitioner annexed ELC Reference No. 1 of 2018 being a suit between the National Land Commission, as the Applicant with the Petitioners as the 1st and 2nd interested party. These are 9 others parties. In the reference, the 3rd Respondent herein was the Applicant, while the 2nd Respondent was sued as the Director of Surveys, Chief Land Registrar, Cabinet Secretary for Education Science and Technology Cabinet Secretary Ministry of Land and Physical Planning and Director as the 7th Interested Party.



29. The 1st Respondent in the matter, the Nairobi City County was sued as the 3rd Interested Party. Only the Ethics & Anti-Corruption Commission Director of Public Prosecution and Patrick Thuithi Kanyuira were parties in that suit but are not parties in this matter.
30. Patrick Thuithi Kanyuira, however has been joined to the suit as a receiver of Continental Credit Finance Limited, in that suit a three Judge Environment & Land Court comprising of Justice E.O Obaga, Koss Bor, & B.M. Eboso delivered Judgment on 28th June, 2019. I shall revert on the contents and the finding of that Judgment.
31. It is only record also that the said judgment aggrieved the parties herein and only filed a Notice of Appeal on 1st July, 2019 vide FM 13 (b) the Memorandum of Appeal is said to have been filed in Nairobi CACA 303 of 2019. In ground 7 of the Memorandum of Appeal, the issue of GSU Land features prominently. I am however not sitting on Appeal from that decision. Annexures FM 14 are various correspondences with the Director of Public Prosecution and the Kenya Anti-Corruption Commission FM 15 deal with various plans and various buildings on the suit land.
32. Annexure 21 is a valuation by company valuers dated 18th April, 2017 and signed by Githiga J. T. The land being valued as [R 7879/25 (which is part of the original 7879/4 the value is given as Kshs.1,400,000,000/=.
33. Annexure FM 22 is pervious valuation. The value as at 18th September, 2017 is placed at Kshs.13,600,000,000/= (Thirteen Billion Six Hundred Million only).
34. Finally, annexure FM 23 is a deed of indemnity given to the National Land Commissioner for the compensation for 13.5 acres for the two schools.

Amended Petition

35. The Petitioner filed an Amended Petition 11th December, 2018. The Petitioner added more prayers and included the Universal Declaration on Human Rights (1948) African (Banjul) Charter on Human and People's Rights 1981 and the International Convention of Civil and Political Rights.
36. Amended Petition is also supported by 7 annexures being: -
 - a. FM1 Board Resolution dated 1st September, 2019.
 - b. FM2 letter dated 17th February, 2017 from J.W Gitau, for the Director Management and Regularisation.
 - c. FM 3 is a letter to the Attorney General to the 1st Respondent.
 - d. FM 4 is a letter to the official receiver regarding Mathare North Drive Inn Estate.
 - e. FM5 is a letter from Stephen Njoroge.
 - f. FM 7 is the Notice of withdrawal of ELC Case No. 819 of 2012.

Responses

37. Upon being served, various parties acted differently. To start with the interested party made on application, which was to await the outcome of the Preliminary Objection. They were subsequently joined to the suit.
38. On the other hand, the 1st Respondent, Nairobi City County made an application dated 17th February, 2020. They sought, inter alios;-



- a. The Petition Amended on 11th November, 2019 be dismissed for want of jurisdiction.
 - b. The Petition Amended on 11th November, 2019 be struck out for being an abuse of the Court process.
 - c. The costs and the application as well as the underlying amended Petition be awarded to the 1st Respondent.
39. The ground in support of Application of the were that; -
- a. The High Court shall not have jurisdiction fully within the Executive Compliance in respect of matters falling within the jurisdiction of the Court's contemplated under Article 162(2), pursuant to Article 165(5) b of *the Constitution*.
 - b. The same is enshrined under Section of the *Environment and Land Court Act* No. 19 of 2011 in read to Compulsory Acquisition of Land, relating to public, private land and any other dispute relating to Environment and Land.
 - c. That nothing in the ELC Act, shall preclude the Court from hearing and determining applications for redress or a denial violation or infringement of 9 or 9th read to right or fundamental freedom relating to a clear and healthy environment under Articles 42, 69 and 70.
 - d. The Court is mandated to issue the following remedies; -
 - i. Award or damages
 - ii. Compensation declaration
 - e. The Act does not preclude the Environment and Land Court from hearing Application for redress of a violation of any other right, if that right is injustice of a dispute relating to land and environment.
 - f. The Amended Petition is an abuse of the Court process as there is pending in Court, Nairobi ELC Petition No. 78/2018 Afrison Export Import & Another Ltd-Vs-National Land Commission & Others over the same subject matter.
40. The 1st Respondent annexed to the Notice of Motion an affidavit sworn 17th February, 2020 by David Oseko who is indicated to be an Advocate and a Director, Legal Services of the 1st Respondent, Nairobi City County.
41. They also annexed etition No. 76 of 2018, filed by the same parties herein, with similar parties as ELC Reference No. 1 of 2018. Except that the Receiver Continental Credit is included and the 11th Interested Party Patrick Thuithi Kanywira is excluded from the Proceedings, the 2 parties are related as been at page 130 of the Petition.
42. In Paragraph 30 of the Petition, the Applicant aver that they are the Proprietors of L.R No. 7879/4.
43. In Paragraphs 47 the Petitioners indicate that the ownership has been affirmed in Nairobi HCC 617/2012 and JR ELC Application 78 of 2008.

Replying Affidavit

44. A Director of the Petitioner Companies, Francis Mburu swore a Replying Affidavit on 24th February, 2020 in Respondent to the Preliminary Objection by 1st & Respondent. [I take this to mean as response to the Application dated and the Preliminary Objection by the 2nd Respondent. He has annexed



pleadings and 3 of the impleaded case. Further he has also annexed various decisions regarding equal status, that is, High Court and ELC.

2nd Respondent's Preliminary Objection

45. The 1st& 2nd Respondents, the Attorney General and Nairobi City County filed Preliminary Objections dated 20th February, 2020 and 18th February, 2020 respectively.
46. The Preliminary Objection dated 20th September, 2019 was based on the following grounds; -
 - a. There are no resolutions authority the filing of these Proceedings on behalf of the Petitioners. There are no resolutions authorising the firms of M/s Okubasu & Mwema & Company Advocates to act for the Petitioners.
 - b. The Honourable Court is divested of jurisdiction to hear and determine this Petition by dint of the provision of: -
 - i. Article 165(5) b of *the Constitution*.
 - ii. Article 162(2) b of *the Constitution*.
 - iii. Section 13 of the *Environment and Land Court Act* No. 19 of 2011.

Preliminaries

47. The objection dated 13th February, 2020 by the Attorney General was based on the following grounds: -
 - a. This Honourable Court, lacks Jurisdiction to entertain and grant orders sought by the Petitioner by dint of Article 165(5) b and Article 162 (2) b of *the Constitution* 13 of the *Environment and Land Court Act* No. 19 of 2011.
 - b. The Petition offends provision of Section 7 of the *Civil Procedure Act* on res judicata in view of the issues hard and determined between National Land Commission and African Export Import Ltd & 10 Others.
 - c. The Petitioners herein are also Petitioners in Constitutional Petition No. 78 of 2018 at the Environment and Land Court where issues similar to those in the instant Petition have been raised and therefore vexatious litigation seeking to abuse of the Court process by filing multiple suits.
48. That the instant petition should be struck out as it is vexatious and has been filed without material disclosure to this Honourable Court of others matters filed by the Court herein.
49. That the litigation must come to and this petition is therefore and abuse of the Court process.

Petitioner's Submissions

50. The Petitioner filed submissions dated 25th November, 2021. They reiterate the averments and posit that; -
 - a. This Court has jurisdiction. They rely on the decision of Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & another [2018] eKLR, which relies on the Supreme Court



of India's decision, of Mahavashtra G Anor Vs National Construction Company Ltd, Bombay Supreme Court Civil Appeal No. 1497 OF 1996, AS 11 which slated;

- “a. Elsewhere, the supreme court of India in State of Maharashtra and Another Vs National Construction Company, Bombay, Supreme Court civil appeal no1497 of 1996 delivered itself very unequivocally and said:

“The important words are “has been heard and finally decided”. The bar applies only if the mater directly and substantially in issue in the former suit has been heard and finally decided by a court competent to try such suit. That clearly means that on the matter or issue in question there has been an application of the judicial mind and a final adjudication made. If the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as res judicata.

51. The Petitioner raised 12 repetitive issues which can be summarized as doth;
- a. Whether this Court is divested of jurisdiction.
 - b. Whether the right of the Petitioners under Articles 40, 47, 10(1), & 2, 21(11), 27, 28, 25, 50, 29, 35(2), 60, 64, 238, 239, 244, and Section 9 of the Trespass Act where violated in the Constructive Administrative of Property.
 - c. Whether the Petitioners are entitled to compensation due to constructive condensation.
 - d. Whether set off should be granted.
52. The Petitioner relies on the following decisions for the assertion that the High Court has a concurrent and coordinate jurisdiction with the environment court to handle violations of Article 10, 28, 35, 40, 47, (a) 69 and 70. These decision are Patrick Musimba Vs National Land Commission & 4 Other (2016) eKLR, Mathatau Ltd vs Commissioner of Lands & 3 Others 2013(eKLR) Jackson Juma Kenga Vs Republic (2019)eKLR, Cosmas Mrombo Moka Vs Co-operative Bank of Kenya.
53. He further submits that ELC Reference No. 1 of 2018 is not res judicata the suit these submissions were filed by Okubasu Munene & Kazugu Advocates for Petitioners.

The Rest of the Submissions.

54. These submissions are in record to the Preliminary Objection and Notice of Motion by 2nd Respondent. These address the issues exclusiveness without going to merits.
55. The first line of attack is that the Notice of Motion is not a matter for a pure point of law. In the submissions the Petitioner sets first the following issues for determination;
- a. Whether the issues raised by the Respondent fit the definition of a Preliminary Objection.
 - b. Whether Article 165(5) b and 162 (2) of the Constitution and Section 13 of the Environment and Land Court Act, bar this Honourable Court from handling matters regarding infringement of right property and in particular constructive Compulsory Acquisition of Land.



- c. Whether the issues raised by the Petition were had and determined in ELC Reference No. 1 of 2018 between National Land Commission vs Afrison Export Import Ltd & 10 Others so as to bar this Petition on grounds of res judicata.
56. The Petitioner quotes, in extensio pertinent paragraphs of Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd (1969) EA 696. Although not indicated the passage, set out below is from paragraph D of the Judgment of Law, J.A as then he was, where he stated in his usual style.
- “I have considerable sympathy with Mr. Gautama’s main ground. I agree that the application for the suit to be dismissed should have taken the form of a Notice of Motion and not a Preliminary Objection, which it was not. So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises out of clear implication out of pleadings, and which if argued as a Preliminary point may dispose the suit. “Examples are Objection to the Jurisdiction of the Court or a plea of limitation of a submission that parties are bound the contract giving rise to the suit to refer the dispute to arbitration.”
57. At this point, it is important to note the rider to justice Law’s elucidation, at paragraph E page 700 of Mukisa Biscuits Manufacturing Co Ltd.(supra) He stated as follows: -
- “However, as the Learned Judge in fact entertained the Application, notwithstanding its defective form, and decided in the Respondent’s favour, the Cross Appeal on the point cannot have a practical effect.”
58. The Petitioner proceeds and quotes in extensio, the lamentations of Sir Charles Newbold, at Paragraph A-B page 701, of the authority of Mukisa Biscuits Manufacturing Co Ltd as doth; -
- “The first matter relates to the increasing practice of raising point, which should be argued in the normal manner, quite improperly by way of a Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raised a pure point of law which is argued on the assumption that all fact has to be ascertained of if what is sought is the exercise of Judicial discretion...”
59. The Petitioner reiterated that ELC referred No. 1 of 2018 concerned two schools, that is Ruaraka Primary School and Ruaraka Secondary School while the position is on law reference LR 1879/25. To the Petitioner these are different issues.
60. Therefore, to the Petitioner those are complex matters that cannot be dealt through preliminary objections. They posit that issues on the Notice of Motion are substantial and cannot be addressed through a Notice of Motion. On jurisdiction rise same issues as submissions dated 24th November, 2021.
61. They also deal with res judicata, as referring to the parcel of land measuring 56.20 Acres and not whether Ruaraka Primary and Secondary Schools occupied land measuring 13.77 occupied Public or Private Land. Reference is sought to annexure FM 2 in the Replying Affidavit.
62. Regarding abuse of the Court process, the Petitioner reiterates same submissions made regarding res judicata. However, in this case it is relating to Petition No. 78 of 2018.
63. The Petitioner prays that, should the Court find that it has no jurisdiction, it should refer the matter to the ELC. They seek refuge in Pamoja Women Developed Programmed and 3 Others Vs Jackson



Kihuba Wangombe & Another (2016)eKLR, where Justice Prof, Ngugi Judge, as then he was, held as doth;-

“in my view, this indicated concurred jurisdiction includes the ability of both the High Court and the Equal states Court to deal with certain procedure of administrative questions that present quasi-judicial issues where the Court in question is requested to acts in the interest of justice or due administration of justice. That is where I would locate the ability of the three Superior Courts or cognate jurisdiction to transfer to the counterpart Superior Court any case filed before it that would more appropriately be adjudicated in the cognate Superior Court under the inspected and concurrent jurisdiction, the High Court was able for example to transfer certain matters to the environment and Environment and labour relations Court mutually.

64. The Petitioner also filed submissions in reply. It dealt with mainly the issue of jurisdiction and the question of resolutions that were raised in by the Attorney General.

1st Respondent's Submissions

65. The first Respondent filed submissions dated 21st February, 2022 reiterating in the background the content of the Notice of Motion and at the same time the Preliminary Objection raised dated 20th September, 2020. The first Respondent also sets forth the reliefs sought, the pertinent ones being;

- a. Declaratory reliefs [a-c]
- b. Declaratory reliefs [I understand these to mean prayers a-c of the Amended relating to pertinent Articles and Land parcel No. LR 7879/25 and LR 7879/4.]
- c. Compensation for Kshs.13,600,000.000/= for use of suit property.
- d. Kshs.22,300,000,000/=
- e. Section of A given of Kshs.1,500,000,000/=.

66. Their understanding is that the Amended Petition is over compensation and rent of Kshs.35,900,000,000/= before the issue of other articles are dealt with is dealt with.

67. The remainder of their issues relates to the authority to file suit and authority of Advocates to plead. I will not dwell on these much for reasons I shall be proffering shortly.

1st Respondent's Issues

68. The first Respondent, set out 3 issues other than costs for determination, that is,

- a. Whether this Honourable Court is divested of jurisdiction to hear and determine this petition.
- b. Whether the 1st Respondent violated the Petitioner's Constitution rights
- c. Whether a set off of Ksh 1,500,000,000/= should be allowed.

69. On Jurisdiction, the 1st Respondent relies in extensio, the elucidate conclusions reached by Nyarangi JA, in the Motor Vessel Lilian S Vs Caltex Oil Kenya Ltd [1989]eKLR. I where the Judge slated a fact quoting a treatise by John Becroft Saunders: -

“Jurisdiction is everything without it, a Court has no power to move one more step where a Court has no jurisdiction, there would be no basis for continuation of Proceedings pending



other evidence. A Court of Law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

70. They quote in extensio the Supreme Court decisions in the matter of Interim Independent Electoral Commission (2011)eKLR and Samuel Kamau Macharia & Another Vs KCB & 2 Others (2012)eKLR. They posit that a Court may not arrogate to itself Jurisdiction through the craft of Incorporation, or by way of endeavours to discern or interpret the intentions of part/point where the worldly of Legislation is clear and there is no ambiguity.
71. To the 1st Respondent the dispute is predominantly on Kshs.13, 600, 000, 000/= loss of income over the suit property. Kshs.22, 300, 000, 000/= being the market value of Land Reference No. LR 7879/25 which is part of LR 7879/4 set off of Kshs.1,500,000,000/= being payment of 13.5364 acres [subject order was made in ELC Reference 1 of 2018].
72. Various development [arising from dealing on the suit by the Government] through various agencies and the 1st Respondent.
73. They elucidate that the subject matter especially against the 1st Respondent is over illegal allotment and illegally receiving rates from the allottees. To that extent thus invoke Article 165 (5) (b) as read with Section 162 to state that this Court is divests of authority to determine these matters.
74. The rest of the submission on jurisdiction are dilatory and involve etymological explanation of the word ‘shall’ in Article 165 (5) b of *the Constitution*. They then quote, almost verbatim pertinent provisions of Article 162(2) b, of *the Constitution*, Section 13 of the Environment and *Land Act*, 2011, including relief where the ELC Court can issue in exercise of its jurisdiction under Section 13 of the ELC Act.
75. The first Respondent then proceeds to rely on the following decisions, that Joyce Muturi Muthaba & Another Vs Josephat Kyollo Wambua [2018]eKLR Abdulkadir Sayyed Ahmed Vs the Office of Court Criminal Investigation (CCIO & 3 Others, Somar Salim Nassir Suleiman), Honey Creapers Investment Ltd Vs CAB Investment Co Ltd & 4 Others(2020)eKLR, among others to show that the claim needs to be in the proper Court. They urge the Court to use the predominant test.
76. Finally, the submissions deal in extensio, on the aspect of res judicata, arising from ELC Reference No. 1 of 2018. The parties are basically agreed on what constitutes res judicata but differ whether it applies to the case with the Respondents maintaining it does while the Petitioner stating that the matter is not res judicata.
 77. The Constitutional duty to determine this issues but fell on my shoulders. I have agonised over the ultimate orders. I will pick it up and deliver a decision on the correct position of law. The parties also dealt with submissions on merit which I shall not deal with in this ruling as will be apparent in a short while.

Litigation History

78. This matter was first before Justice Makau on 25th September, 2019. The Judge ordered filing of the Amended Petition and gave 19th November, 2019 for further directions. On 19th January, 2019 this Court gave directions that the Petitioner to pay Court filing fees within 14 days from 19th November, 2019.
79. On 18th February, 2020 the Court direct that the 1st Respondent Preliminary Objection dated 20th September, 2011 and 3rd Respondent is Preliminary Objection dated 1st February, 2020 highlighting was to be on 22nd April, 2020. There is no record on what transpired on 22nd April, 2020.



80. The Court Further ordered that the Petitioner file a fresh replying affidavit both softcopies and hardcopies. The matter was for direction on 27th October, 2020.
81. The parties appeared before the Judge (Hon. Weldon Korir on 3rd September, 2020 and directed that the proposed interested party's application be mentioned for direction on 27th October, 2020.
82. The parties were given time to file submissions in terms of orders of 5th November, 2020; submissions were to be filed and served for highlighting. The submissions, were to be on the 1st and 2nd Respondent's Preliminary Objection. Highlighting was to be done on 19th May, 2021. A consent was to be filed on 14th July, 2021.
83. On 30th November, 2021 the Court ordered re-filing of the Petitioner's submissions. The matter was to be mentioned for compliance.
84. When the matter came up before Hon. Ong'undi on 22nd March, 2020 the parties indicated they have filed submissions on the Preliminary Objection and the consent. Mr. Nzioka, Mrs. Clubile Mr. Okubasu and Mr. Mukoku were present.
85. The issue of the interested party was raised on 16th May, 2022 and the Court settled that there was no Interested Party in this case on 16th May, 2022. The court allowed Petitioner to file a further affidavit to include documents related to ELC 78/2018.
86. The receiver, Patrick Thoithi Kanyuira was joined to the suit on 16th May, 2022. The matter could not proceed next till it was brought to me during the Rapid Result Initiative (RRI) exercise. I heard parties on 18th January, 2023 and reserve Judgment for 10th March, 2023.

Interested Party's Submissions

87. I have perused the interested party's submissions but they do not touch on any of the issues raised in the Preliminary Objection. I have however noted their position.
88. I am guided by the Supreme Court decision in *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR, where they stated as doth: -

“44] On the same lines of reasoning, the High Court, in *Judicial Service Commission v. Speaker of the National Assembly and Attorney General*, High Court Constitutional and Human Rights Division Petition No. 518 of 2013, 2013 [eKLR] (Odunga J.) has thus stated (paragraph 4):

“*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as ‘a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’. From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly nonpartisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.”



89. The court has power to determine whether it has jurisdiction, this is what in arbitration is known as the principle of competence-competence. Jurisdiction is that power or authority conferred on a Court to determine disputes presented before it for adjudication. It is well settled that this power or authority is donated by *the Constitution*, Statute or both. Further, a party cannot confer jurisdiction to the Court and neither can the Court arrogate itself jurisdiction which it does not possess.
90. In so submitting, we rely on the following authorities:
- a. Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the Supreme Court pronounced itself on the issue of jurisdiction viz; ‘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..... 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.’ (Emphasis added)
 - b. Interim Independent Electoral Commission [2011] eKLR where it was stated that:

“(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by Statute Law, and by Principles laid out in judicial precedent. And; “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. – Okiya Omtatah Okoiti & another v Attorney General & 2 others [2015] eKLR
 - c. Alice Mweru Ngai v Kenya Power & Lighting Co. Ltd [2015] eKLR the court relied on the case of Joseph Njuguna Mwaura & others VS Republic C.A Criminal Appeal NO. 5 of 2008 (NBI) where it was stated as follows:-

“This position was emphasized in Karisa Chengo, Jefferson Kalama, Kengha & Kitiso Charo Ngati vs. Republic (2015)Eklr where the court of appeal held: -

The jurisdiction of the High Court is limited, it cannot exercise jurisdiction on matters falling within the jurisdiction of the two courts contemplated in Article 162(2). Therefore, the High Court no longer has original and unlimited jurisdiction in all matters as it used to have under the repelled Constitution. It cannot deal with matters set out under Section 12 of the ELRC and section 1 of the ELC Act. Conversely, the ELRC and ELC cannot deal with matters reserved for the High Court.”

Claim for set off

91. The set off is not a fresh claim .is a claim that this court should determine that it sets of the decree in reference no 1 of 2018, this is in discharge or satisfaction of the decree. Section 34 of the *civil procedure act* provides as doth: -
34. Questions to be determined by court executing decree



- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

92. There is no provision for filing a separate suit to enforce a decree or satisfaction of the same. In *Nazir Jinnah v Asmahan Peterson & 2 others* [2013] eKLR, the court stated as doth: -

“I have considered the provisions of section 34 (1) of the *Civil Procedure Act* which are very clear. It reads: -

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

To my mind therefore, any questions as to the value of the suit motor vehicle, the legality of the auction sale or the execution process should be addressed to the court executing the decree. In this instance, it is the Chief Magistrate’s Court at Milimani. As I read section 34 (1) this Court has no jurisdiction in relation to such matters and on that ground alone, I would dismiss the Plaintiff’s application dated 28 November 2012 and order that the suit herein be struck out.”

92. The petitioner cannot therefore institute a fresh suit over 1,500,000, 000/=. This remains in the province of the court that issued the decree. There can be no fresh suit. Any such fresh suit is liable to be struck out. The claim for 1,500,000,000/= as a set off is thus untenable and is accordingly struck out.

93. All question relating to it must be dealt with by the court that issued the orders. costs ordinarily follow the event. The 1st and 2nd Respondents had to deal with a plethora of issues related to the set off of Ksh 1,500,000,000/=. They are entitled to costs. In other words, there is nothing to disentitle them of costs. I therefore award costs to the 1st and 2nd Respondents.

94. Section 27 of the *Civil Procedure Act* provides;

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

95. Having awarded the costs to the Respondent, I exercise discretion to determine at this time of Judgment the extent to which costs are to be paid. I therefore award costs Ksh.1,600,000/= each to the 1st and 2nd Respondents for the struck out portion of the Petition. The same shall be paid within 60 days, failing which execution do issue.



96. Before I deal with the claim, I need to deal with the interested party. It is an unnecessary appendage to this claim. If they have a cause, let an application for joinder be made and they are added as parties, that is Applicants or Respondents. In the meantime, the claims by the third party are struck out. The interested party is not necessary for determination of any of the matters now about to be dealt with. The interested party is removed from proceedings. There be no order as to costs as between the interested party and others.
97. Now turn to the rest of the claim. The same is predominantly a land matter with a sprinkling of claims that relate to breach international treaties by forcible take over by government of private property. These claims are quasi-independent from the claim of land. Further, the claim of levying of rates to third parties on land they do not own is strictly no land. However, it is an appendage to the main claim.
98. Further, I note there are several interests noted in the register of the suit land. It is therefore necessary that the matter be transferred to the land court so that all these claims can be dealt with, if the suit survives or such part of the suit that survives Res judicata.
99. I do not wish to delve into the issue of res judicata, as this may unduly tie down the court dealing with the question and the question 2nd Respondent's Application. However, given that the predominant question is land, exercise my discretion transfer the entire claim, including execution for the struck out portion, as they are inseparable, to the environment and land court.
100. I have seen the apathy with which the applicant views the Environment and land court. It was clear from one day, that for some reason the petitioners were hedging their bets. They have cases all over. Whether these amount to res judicata, is for the new court to deal with.
101. I recall the postulations in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex Parte Law Society Of Kenya [2020] eKLR
39. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.^[25] A litigant has no right to pursue paripassu two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process. It matters not that the earlier suit was filed by the Branch of the LSK while the instant suit is filed by the main body.
102. This are just postulations, let the ELC Court deal with it.
103. Fortunately, in our constitutional architecture they are proper forum to adjudicate on the matter. The matter is now transferred to the Environment and Land Court. That court will deal with the remainder of the preliminary objection and the issue of res judicata.
104. Costs to the First and 2nd Respondents.



DETERMINATION

105. I therefor make the following orders: -

- a. The claim for a set off for a set for Ksh 1,500,000,000/= is untenable and is accordingly struck out with costs of Ksh. 1, 600, 000/= each to the 1st and 2nd Respondents for the struck out portion of the Petitioner.
- b. The matter is now transferred to the Environment and Land Court. That court will deal with the remainder of the preliminary objection and the issue of res judicata.
- c. The matter will be mentioned on 21/3/2023 before the principal judge Environment and Land Court.
- d. Costs to the Respondents.

It is so ordered

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF MARCH, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

Dr. Okubasu for the 1st Petitioner

Miss Ndung'u for the 2nd the Petitioner

Miss Kirui holding brief for Mr Njenga for the Interested Party

Mr Mokuia Ndubi for the 1st Respondent

Miss Chibole for the 2nd Respondent

Oliver Musundi /Achieng – Court Assistant.

