



**Rotich v Bii (Environment & Land Case 8B of 2023)
[2025] KEELC 3826 (KLR) (12 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 8B OF 2023**

LA OMOLLO, J

MAY 12, 2025

BETWEEN

PETER KIPYEGON ROTICH PLAINTIFF

AND

ELIJAH KIPNGENO ARAP BII DEFENDANT

RULING

Introduction.

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 15th November, 2024. The application is expressed to be brought under Order 15 Rule 15 of the Civil Procedure Rules, Sections 1A, 1B, 3A, 63 (e) of the *Civil Procedure Act*, Section 13 of the *Environment and Land Court Act*, Articles 162(2) & (3) and Article 165 (3) of *the Constitution* of Kenya.
2. The application seeks the following orders;
 - a. Spent
 - b. That the Honourable Court be pleased to review, vary, set aside and/or vacate the Honourable Court's suo moto orders given on 16th October, 2023 transferring this matter from the High Court Civil Division to the Environment and Land Court.
 - c. That the Honourable Court do issue an order declaring and/or certifying that the Environment and Land Court lacks jurisdiction to hear and determine this matter.
 - d. That the Honourable Court do consequently declare the proceedings that have so far taken place before the Environment and Land Court as a nullity and the same be expunged from the Court record.



- e. That the Honourable Court do order and direct that the Court bestowed with the jurisdiction to hear and determine this matter is the High Court Civil Division which is the Court where the suit was initially filed and proceedings went on since the filing of the suit on 2nd December, 2003.
 - f. That the Honourable Court be pleased to order that this matter be returned and/or transferred back to the High Court Civil Division for hearing and final determination.
 - g. That the Honourable Court be pleased to issue any other necessary order as it may deem fit for the ends of justice to be met.
3. The application is based on the grounds on its face and the supporting affidavit of one Elijah Kipngeno Arap Bii sworn on 15th November, 2024.

Factual Background.

4. The Plaintiff/Respondent commenced the present proceedings vide the Complaint dated 6th November, 2003 wherein he seeks the following orders;
- a. An order for vacant possession of the suit property.
 - b. Mesne profits.
 - c. Interest on (b) above.
 - d. Costs.
 - e. Other or further relief the Court may deem fit to grant.
5. The Defendant/Applicant filed a Statement of Defence and Counterclaim dated 16th January, 2004 wherein he joined Kenya Commercial Bank as the 1st Defendant. In his Counter claim he seeks the following orders;
- a. A declaration that the said sale to the 2nd Defendant is void ab initio.
 - b. General damages.
 - c. Costs of this suit.
 - d. Any other relief that the Honourable Court may deem fit to grant.
6. The 1st Defendant/Respondent in the Counterclaim filed a Statement of Defence dated 4th February, 2004. It seeks that the Counterclaim be dismissed with costs.
7. The application under consideration first came up for directions on 29th November, 2024 when the Court directed that it be served upon the Respondents.
8. On 9th December, 2024 the Court gave directions that the application be canvassed by way of written submissions.
9. On 10th February, 2025 the application was mentioned to confirm filing of submissions and it was then reserved for ruling.

The Defendant/Applicant's Contention.

10. The Defendant/Applicant contends that the central issue in the present proceedings is whether the 1st Defendant/Respondent in the Counterclaim exercised its statutory power of sale lawfully.



11. The Defendant/Applicant also contends that this can be discerned from Paragraphs 9,10 and 11 of his Statement of Defence and Counterclaim, prayer (a) of his counterclaim, Paragraphs 4, 5, 7, 8, 9 & 10 of the 1st Defendant/Respondent in the Counterclaim's Statement of Defence and Paragraphs 12, 13, 14, 15 and 18 of the Plaintiff/Respondent's Reply to Defence and Defence to Counterclaim.
12. The Defendant/Applicant sets out the averments at paragraphs 9, 10 and 11 of his Statement of Defence and Counterclaim as follows;
 - “ 9. Sometime around 1977, 1988 and 1991, the Plaintiff charged land registration number Kericho/Kabianga/1824 and the developments thereto to the 1st Defendant for an advance of credit facilities with itself.
 10. On or about October 2003, the 1st Defendant communicated to the Plaintiff that it had sold the Plaintiff's said land Kericho/Kabianga/1824.
 11. It is the Plaintiff's case that if any sale took place as purported by the 1st Defendant, then the same was done fraudulently and in breach of the laid down provisions of law.”
13. The Defendant/Applicant then sets out particulars of fraud by the Defendants in his counterclaim.
14. The Defendant/Applicant also sets out paragraphs 4, 5, 7, 8, 9 and 10 of the 1st Defendant/Respondent in the Counterclaim's Statement of Defence as follows;
 - “ 4. The Plaintiff in the Counterclaim defaulted in the repayment of the credit facilities granted to him by the 1st Defendant from time to time and secured by the charge and further charges on LR Number Kericho/Kabianga/1824.
 5. The 1st Defendant states that it sold the Plaintiff's LR No. Kericho/Kabianga/1824 to the 2nd Defendant in the counterclaim in regular and lawful exercise of its chargee's power of sale conferred to the 1st Defendant by the admitted security instruments.
 7. Save that the 1st Defendant sold the suit/charged property to the 2nd Defendant in lawful and regular exercise of chargee's statutory power of sale, the 1st Defendant denies that the sale of the charged property was done fraudulently or in breach of the laid down provisions of the law as alleged by the Plaintiff in the counterclaim or at all and the Plaintiff in the counterclaim is put to strict proof thereof.
 8. The 1st Defendant denies all the particulars of fraud set out in paragraph 11 of the defence and counterclaim and the Plaintiff in the counterclaim is put to strict proof thereof.
 9. The 1st Defendant in the counterclaim states that all the requisite statutory notices were served.
 10. The Plaintiff in the counterclaim is heavily indebted to the 1st Defendant and the present suit is an afterthought, has no merits and constitutes a gross abuse of the Court process.”



15. The Defendant/Applicant also sets out the contents of paragraphs 12, 13, 14, 15 and 18 of the Plaintiff's Reply to Defence and Counterclaim as follows;
- “ 12. The Plaintiff denies the allegations of fraud set out at paragraph 11 and particularly states that the auction sale was legal and proper having been preceded by the necessary notices. The Defendant is put to strict proof.
13. Further, the Plaintiff denies that the current market value is Kshs. 7,000,000.00 but states that the purchase price exceeded the forced market value of the suit property and the required consents were duly obtained before the registration of transfer by chargee.
14. Further and without prejudice to paragraph 11 and 12 (above), the Plaintiff avers that as a purchaser at the public auction he was not under duty to establish that the seller had complied with its obligations under charge or credit contract or that the resolution/decision to sell by public auction was properly arrived at or that it issued all requisite notices under the relevant act or that the value of the property has been ascertained or that all requirements of law had been fulfilled before the auction and therefore the purchase and subsequent transfer for value cannot be defeated for the reasons alleged by the Defendant or at all.
15. The Plaintiff avers that the suit property is of a known monetary value which can be adequately compensated by the seller and the prayer for cancellation of sale is improper and not available.”
16. The Defendant/Applicant contends that one of the prayers he seeks in his Counterclaim is for a declaration that the sale to the 2nd Defendant/Respondent in the Counterclaim is void ab initio.
17. He also contends that Justice M.G Mugo made a decision on 13th May, 2005 which was set aside by the Court of Appeal vide a judgement delivered on 31st July, 2015. He adds that the issues in contest are clearly discernible from the said decisions and they demonstrate that the issue before Court for determination is a commercial dispute.
18. He further contends that the main issue has to do with the exercise of the statutory power of sale, mortgages and whether the relevant statutory notices that precede a statutory power of sale by chargor were issued and served before the auction took place.
19. It is his contention that the Court of Appeal in *Bank of Africa vs TSS* (citation not given) found that such issues are within the jurisdiction of the High Court and not the Environment and Land Court.
20. It is also his contention that the commercial dispute in the present matter is beyond the scope of the Environment and Land Court as set out under Article 162(2) and (3) of *the Constitution* of Kenya and Section 13 of the *Environment and Land Court Act*.
21. The Defendant/Applicant reiterates that it is the High Court that has the jurisdiction to hear this matter and adds that the suit was filed before the High Court on 2nd December, 2003.
22. He further contends that the High Court entered a summary judgement which was set aside by the Court of Appeal in Civil Appeal No. 143 of 2006 on 31st July, 2015.



23. He also contends that the suo motu orders given on 16th October, 2023 transferring the matter to the Environment and Land Court should therefore be varied, vacated and/or set aside so that the file can be taken back to the High Court where the proceedings have all along been taking place.
24. He further contends that he together with his Advocate had not given much thought to the Environment and Land Court's jurisdiction in this matter until sometime around 12th November, 2024 when his advocate came across a recent Court of Appeal decision in Bank of Africa Ltd & another vs TSS Investment Ltd & 2 Others (citation not given) which judgement was delivered on 26th April, 2024.
25. It is his contention that his advocates on record came to learn of various judgements and rulings that have determined the jurisdiction of the Environment and Land Court vis a vis the High Court more particularly on contested issues of charges and statutory notices, accounts, auctions among other issues. He adds that the Court of Appeal judicial authorities are Bank of Africa Ltd & another vs TSS Investment Ltd & 2 Others (citation not given) and Co-operative Bank Ltd & another vs Patrick Kang'ethe Njuguna & 5 Others (citation not given).
26. It is also his contention that the other judicial authorities are Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another [2021] eKLR and Kinuthia v Kanyi & another (Environment & Land Case E007 of 2023) [2024] KEELC 1625 (KLR) (20 March 2024) (Ruling).
27. It is further his contention that in the judicial decision of Owners of the Motor Vessel Lilian S. vs Caltex Oil (K) Ltd (1989) KLR the Court found that jurisdiction is everything without which the Court can do nothing else but down its tools. He adds that it goes without saying that the proceedings already undertaken in the matter are a nullity and the earlier the matter is dealt with in a competent Court with jurisdiction the better.
28. He contends that there are other related matters arising out of the same cause of action between himself and the 1st Defendant/Respondent in the Counterclaim which are Nairobi Commercial and Civil Suit Case No's 605 of 2005 and 882 of 2003. He adds that one of the said suits ended up in the Court of Appeal twice that is Civil Appeal No. 155 of 2006 as consolidated with Civil Appeal No's 276 and 318 of 2008.
29. He also contends that all those matters were heard and determined by the High Court, were over the same cause of action, the same parties but over different parcels of land. He adds that the purchasers in the public auctions were different.
30. He ends his deposition by stating that justice in the matter dictates that the application herein be allowed so that the hearing of this old matter can be expedited.

The 1st Defendant/Respondent in Counterclaim's Response to the application.

31. The 1st Defendant/Respondent in the Counterclaim filed Grounds of Opposition dated 5th December, 2024 in response to the Defendant/Applicant's application.
32. They are as follows;
 - a. The Application is frivolous and an abuse of the Court process.
 - b. The application is incompetent and ill – advised as the judgements and rulings the Defendant/Applicant's Advocates came to learn (Bank of Africa Ltd & another vs TSS Investment Ltd & 2 Others; Co-operative Bank Ltd vs Patrick Kang'ethe Njuguna & 5 Others; Machakos ELC Case No. 40 of 2020 (Thomas Mutuku Kasue vs HFCK & another) and Malindi ELC



No. E007 of 2023 (Pius Kinuthia Kamau vs David Mureithi Kanyi & another) do not raise common issues for determination as the instant case.

- c. The application is an afterthought as the Defendant's Legal Representatives at all times consented to the jurisdiction of this Honourable Court to hear and determine the matter.
 - d. The application is misdirecting this Honourable Court on the primary cause of action by highlighting facts limited to the statutory power of sale and security documents thereof as opposed to the prayers/claims in the parties' pleadings which are centralized on the ownership, sale, possession and vacant possession of the suit property which is within the jurisdiction of this Honourable Court (Kericho) as well as the jurisdiction of this Honourable Court conferred to it by Article 162 (2)(b) of *the Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act* No. 19 of 2011.
 - e. The Court of Appeal in Civil Appeal No. 143 of 2006 vide a judgement delivered on 31st July, 2015 in its final orders at paragraph 30 therein set aside the ruling of Justice M. G Mugo and ordered that the dispute on the ownership of the suit property shall be heard and tried on priority basis by any other judge with jurisdiction excluding Justice M.G Mugo.
 - f. The suit cannot be transferred to the High Court Civil Division where the proceedings had all along taken place since the filing of this suit on 2nd December, 2003 whereas the same Court found it has no jurisdiction and hear and determine the matter. (sic)
 - g. The Nairobi High Court Civil Division does not have jurisdiction to deal with commercial disputes.
 - h. The instant suit was initiated by the Plaintiff/Respondent seeking orders of vacant possession of the suit property and mesne profits against the Defendant/Applicant unlike in High Court Civil Case No. 605 of 2005 and 882 of 2003 initiated by the Defendant/Applicant against the purchasers and registered owners of the suit properties thereof and thereafter filing counterclaims against the 1st Defendant in the Counterclaim in the instant suit. (sic)
 - i. The Defendant/Applicant is guilty of laches in bringing the application for review of orders which it's Advocates consented to.
33. This Court notes that when the application under consideration came up for hearing on 9th December, 2024 counsel for the Plaintiff/Respondent informed the Court that he had filed a Replying Affidavit sworn by Peter Rotich on 28th November, 2024.
34. The said replying affidavit was neither on the Court record or the e-filing portal. The Defendant/Applicant seems to have been served with it and has responded to it.

The Defendant/Applicant's Response to the Plaintiff/Respondent's Replying Affidavit.

35. He deposes that the Plaintiff/Respondent should not condemn him for defending the suit and filing a counterclaim. He goes on to state that the counterclaim challenges the transfer of the suit property to the Plaintiff/Respondent which is his right under Article 48 of *the Constitution* of Kenya.
36. He also deposes that even though the Plaintiff/Respondent claims to be the registered owner of the suit parcel, he should not forget that the suit parcel originally belonged to him. He adds that he has valid grounds to challenge his dispossession of the suit parcel by the 1st Defendant/Respondent in the Counterclaim in alleged collusion with the Plaintiff/Respondent.



37. He further deposes that the pendency of this suit for over twenty years is not of his own making as he has only recently sought for an adjournment for the first time on 20th May, 2024 when he was sick and admitted in hospital.
38. It is his deposition that he only sought the 2nd adjournment on 23rd September, 2024 during the hearing of the Plaintiff/Respondent's case due to a mix up in his (Plaintiff/Respondent) documents which he had not served on his (Defendant/Applicant) advocates. He goes on to state that the said bundle of documents was only served upon his advocates on 3rd October, 2024 after the matter was heard on 23rd September, 2024.
39. It is also his deposition that he filed an appeal to the Court of Appeal over the summary judgement entered against him on 13th May, 2005 which was within his constitutional right and was not meant to delay the hearing and determination of this suit. He adds that the said appeal was merited and was allowed by the Court of Appeal and he was not expected to sit back and live with the erroneous orders given by the Court on 13th May, 2005.
40. It is further his deposition that he was not aware of the alleged attack on the Plaintiff/Respondent that he alluded to under paragraph 4 of his replying affidavit as he has always been in occupation of the suit parcel.
41. He deposes that the Plaintiff/Respondent contributed to the delay in the hearing and determination of this matter as the Court of Appeal delivered its judgement on 31st July, 2015 but it took the Plaintiff/Respondent ten years to file an application for re-construction of the Court file.
42. He also deposes that the said application could have been filed in the year 2015 when the Court of Appeal ordered that the suit be heard on a priority basis. He goes on to state that the Plaintiff/Respondent sat on his right to have the suit heard and determined on merit at the earliest opportunity and that he cannot now turn around and maliciously blame him for the long time the suit has taken to be heard and determined.
43. He further deposes that he has been informed by his advocates on record that the Plaintiff/Respondent has deliberately misled the Court at paragraphs 12, 13 and 14 of his Replying Affidavit by falsely stating that the parties appeared before Justice Serگون on 16th October, 2023 on which date orders of transfer of the suit to this Court were given. He goes on to state that this matter was transferred to this Court suo motu without appearance in Court by any of the parties.
44. It is his deposition that Lady Justice Christine Meoli correctly exercised the Court's inherent powers when she transferred this suit to Kericho High Court.
45. He reiterates that his advocate on record informed him that on 12th November, 2024 he came across Court decisions the latest being a Court of Appeal judgement delivered on 26th April, 2024 on the jurisdiction of the High Court on land matters vis a vis this Honourable Court which is the reason why he could not have filed the present application earlier.
46. He deposes that the chronology of events that took place as detailed by the Plaintiff/Respondent in his replying Affidavit leading to the hearing of this matter on 23rd September, 2024 is neither here nor there as there is an explanation as to why the application was not filed earlier.
47. He also deposes that the assertions made at paragraph 19 of the Plaintiff/Respondent's Replying Affidavit are false. He goes on to state that on 23rd September, 2024, the hearing of the matter was not adjourned due to his advocates sickness and/or fatigue from foreign travel but on account of non-



- service of the bundle of documents the Plaintiff/Respondent was relying on which were not served upon him. He reiterates that the said bundle of documents was served upon him on 3rd October, 2024.
48. He further deposes that the Plaintiff/Respondent's averments at paragraph 20 of his replying affidavit are scandalous as he insinuates that he (Defendant/Applicant) has a frivolous defence and has therefore delayed the hearing of this matter. He adds that the Court of Appeal in Civil Appeal No. 143 of 2006 set aside the previous judgement and directed that the matter be heard afresh because he has a merited defence and therefore the Plaintiff/Respondent is openly lying and has fallen short of committing perjury before the Court.
49. It is his deposition that he does not understand how the Plaintiff/Respondent can suggest that the dispute between him and the 1st Defendant/Respondent in the counterclaim is fully resolved as the cases referred to have nothing to do with the suit property. He adds that how different suits filed in respect to different properties and parcels of land should be similar to the present matter is not understandable.
50. It is also his deposition that the Plaintiff/Respondent has conceded under paragraph 27(2) of his replying affidavit that the questions about the legality of the charge and service of statutory notices before a sale and transfer of title, which is the central contest in this matter, lie within the jurisdiction of the High Court. He adds that the matter should therefore be transferred back to where it has all along been. That is the High Court.
51. It is further his deposition that paragraph 27(d) of the Plaintiff/Respondent's Replying Affidavit is not true. He goes on to state that this Court is under the compulsion to down its tools immediately it finds that it does not have jurisdiction as jurisdiction is everything.
52. He deposes that if the matter proceeds, it will in the long run only turn out to be an academic exercise and further delay the hearing and determination of this suit. He adds that a lot of time will be saved by having the matter transferred immediately to the High Court so that it can be given a priority date for hearing and determination.
53. He also deposes that regardless of the timing of the present application which in any case is filed within one year of the transfer of the suit to this Honourable Court as against the over twenty years the matter has been in Court. (sic) He adds that nothing can change the fact that this Court has no jurisdiction.
54. He further deposes that it is not understandable how the Plaintiff/Respondent expects him to file a separate suit between himself and the 1st Defendant/Respondent in the counterclaim on the issues of the charge and service of statutory notices over the suit property and yet the determination of the said issues will lead to the determination of whether the transfer of the suit parcel to him (Plaintiff/Respondent) should be nullified.
55. He reiterates that the Plaintiff/Respondent concedes that the issues raised in this matter are within the jurisdiction of the High Court save that the contest is between him (Defendant/Applicant) and the 1st Defendant/Respondent in the Counterclaim.
56. He ends his deposition by urging the Court to allow the application and transfer the suit to the High Court.

Issues for Determination.

57. The Defendant/Applicant filed his submissions on 17th December, 2024, the Plaintiff/Respondent filed his submissions on 21st January, 2025, the 1st Defendant/Respondent in the Counterclaim filed



its submissions on 22nd January, 2025 while the Defendant/Applicant filed submissions in response to the other parties' submissions on 6th February, 2025.

58. The Defendant/Applicant reiterates the averments in his affidavit in support of the application, his further affidavit, relies on the judicial decisions of Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment), Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR and submits that the issues raised in the present suit are whether statutory notices were served and whether auctioneers conducted the sale of the suit parcel lawfully. He also submits that the said sale was as a result of a charge that was registered on his (Defendant/Applicant) land to the 1st Defendant/Respondent in the counterclaim.
59. The Defendant/Applicant relies on the judicial decisions of Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another [2021] eKLR, Kinuthia v Kanyi & another (Environment & Land Case E007 of 2023) [2024] KEELC 1625 (KLR) (20 March 2024) (Ruling) and submits that the Court found that the Environment and Land Court does not have the jurisdiction to deal with suits contesting the exercise of statutory power of sale of a charged property which is the predominant issue in the present suit.
60. The Defendant/Applicant concludes his submissions by urging the Court to allow his application in terms of prayers 2, 3, 4, 5, 6 and 8.
61. The Plaintiff/Respondent submits that on 16th October, 2023 Justice Joseph Serگون transferred the present suit from the High Court to this Court.
62. The Plaintiff/Respondent also submits that the matter was mentioned before this Court on 7th November, 2023, 7th December, 2023 and 23rd January, 2024 for pretrial directions.
63. The Plaintiff/Respondent further submits that the matter was scheduled for hearing on 20th May, 2024 which hearing was adjourned to 23rd September, 2024 when his (Plaintiff/Respondent) case was heard and closed.
64. It is the Plaintiff/Respondent's submissions the Defendant/Applicant's case was scheduled for hearing on 21st January, 2025 and to prevent the hearing of his case, he filed the application under consideration seeking that the suit be transferred to the High Court.
65. It is the Plaintiff/Respondent's submissions that he filed a Replying Affidavit sworn on 28th November, 2024 where he opposed the said transfer as it has been filed too late and it is an abuse of the Court process.
66. The Plaintiff/Respondent submits on the following issues;
 - a. Is the Environment and Land Court vested with the jurisdiction to entertain an application seeking the review of a decision made by the High Court on 16th October, 2023 to transfer this case?
 - b. Was this application brought late in the day without explaining the prolonged delay?
 - c. Whether there are grounds for review.
 - d. Whether in ascertaining the cause of action in this suit, the Court should limit itself to the Plaintiff, invoke the predominant purpose test, and consider the suit framed in the Plaintiff.



- e. Having heard the case of the Plaintiff, and in the totality of the circumstances of this case, whether the Court can properly transfer the suit as sought by the Defendant.
67. On the first issue, the Plaintiff/Respondent submits that it was the High Court that transferred the present suit to the Environment and Land Court and therefore the application for transfer should have been made to the High Court and not this Court.
68. The Plaintiff/Respondent relies on Order 45 Rule 1 of the Civil Procedure Rules, Section 80 of the *Civil Procedure Act* and reiterates that the High Court is the proper Court to hear and determine the present application.
69. On the second issue, the Plaintiff/Respondent submits that the Defendant/Applicant filed the present application thirteen months after the present suit was transferred and he must therefore give reasons for this delay.
70. The Plaintiff/Respondent relies on the judicial decision of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) P[2022] KECA 1188 (KLR) (28 October 2022) (Ruling) and submits that the Defendant/Applicant has not given a satisfactory explanation for the delay and the application should therefore be dismissed.
71. With regard to the third issue, the Plaintiff/Respondent submits that the Defendant/Applicant has delayed the hearing and determination of the present proceedings.
72. The Plaintiff/Respondent also submits that the jurisdiction of this Court to set aside its decisions is not designed to serve a party who deliberately sought to evade, obstruct or delay the course of justice.
73. The Plaintiff/Respondent relies on the judicial decisions of *Shah vs Mbogo & another* [1967] EA 116, *Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 Others* [2009]eKLR and submits that the Defendant/Applicant's application is vexatious and oppressive to him. He also submits that the said application is frustrating his quest for vacant possession of the suit parcel and it therefore amounts to an abuse of the Court process.
74. The Plaintiff/Respondent relies on Section 3A of the *Civil Procedure Act* and urges the Court to consider the injustice and prejudice that is to be visited upon him as this is an old matter.
75. The Plaintiff/Respondent submits that the application under consideration is an afterthought and relies on the judicial decision of *Stanley Kahoro Mwangi and 2 Others vs Kanyamwi Trading Company Limited* [2015] eKLR in support of his submissions.
76. On the fourth issue, the Plaintiff/Respondent submits that where a party is not satisfied with the decision of the High Court it ought to appeal to the Court of Appeal. The Plaintiff/Respondent relies on the judicial decision of *Pancras T. Swai vs Kenya Breweries Limited* [2014]eKLR in support of his submissions.
77. The Plaintiff/Respondent submits that the Defendant/Applicant contends that he discovered authorities and yet the discovery contemplated by Order 45 Rule 1 of the Civil Procedure Rules is not of law but of evidence. The Plaintiff/Respondent relies on the judicial decision of *Pancras Swai vs Kenya Breweries Limited* [2014] eKLR in support of his submissions.
78. The Plaintiff/Respondent relies on the judicial decision of *Nyamogo and Nyamogo v Kogo* [2001] EA 174 as was cited in *Muyodi v Industrial Commercial Development Corporation & anor* [2006] 1EA 243 and submits that an application for review can only be considered on the ground of an error apparent on the face of the record and not on the basis of an erroneous Court decision.



79. The Plaintiff/Respondent also submits that the High Court's decision to transfer the matter from the High Court to the Environment and Land Court is not an error apparent on the face of the record.
80. The Plaintiff/Respondent further submits that the misconstruing of a statute or a provision of the law cannot be a ground for review.
81. It is the Plaintiff/Respondent's submissions that the Defendant/Applicant contends that Justice Serگون made an erroneous decision in transferring the present suit to the Environment and Land Court which argument cannot constitute a ground for review. The Plaintiff/Respondent relies on the judicial decision of National bank of Kenya Ltd vs Ndungu Njau (citation not given) in support of his submissions.
82. The Plaintiff/Respondent urges the Court to dismiss the Defendant/Applicant's application as provided for under Order 45 Rule 3(1) of the Civil Procedure Rules which empowers the Court to dismiss an application for review which does not disclose any grounds for review.
83. On the fifth issue, the Plaintiff/Respondent submits that the Defendant/Applicant is inviting this Court to only consider his course of action as pleaded at paragraphs 9, 10 and 11 of his Statement of Defence and Counterclaim.
84. The Plaintiff/Respondent also submits that the course of action in this suit cannot be sourced from the Defence and Counterclaim since a Defence merely explains why the claim in the Plaint is not sustainable or should not be granted.
85. It is the Plaintiff/Respondent's submissions that the proper course of action is found in the Plaint dated 6th November, 2003 where he pleads that the suit parcel is registered in his name and the Defendant/Applicant has without any color of right interfered with his quiet possession. He submits that his claim is for vacant possession of the suit parcel which is within the jurisdiction of the Environment and Land Court.
86. It is also the Plaintiff/Respondent's submissions that the Statement of Defence dated 16th January, 2004 consists of mere denials and therefore the claim falls within the jurisdiction of this Court.
87. It is further the Plaintiff/Respondent's submissions that particulars of fraud are in the realm of evidence and cannot be the basis of assessing what constitutes a Course of action.
88. The Plaintiff/Respondent submits that the dispute alleged by the Defendant/Applicant as against the 1st Defendant/Respondent in the counterclaim is subject to multiple pending cases. He goes on to state that the other pending matters before the High Court are Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited [2001]eKLR and Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited Civil Appeal No. 81 of 2004. He adds that the Defendant/Applicant is silent on the outcome of this cases but is keen to stop the proper trial of the present suit.
89. The Plaintiff/Respondent also submits that the jurisdiction of the Environment and Land Court is provided for under Section 13 of the *[Environment and Land Court Act](#)*.
90. The Plaintiff/Respondent relies on the judicial decision of Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & another [2016]eKLR and submits that where a matter is marred with issues partly falling within the jurisdiction of the High Court and party within the Environment and Land Court, the predominant purpose test must be applied.
91. The Plaintiff/Respondent also submits that the remedies sought by parties in a suit and the nature of the dispute are two fundamental factors that should guide the Court in considering whether the matter



- falls within the jurisdiction of the Environment and Land Court or the High Court. The Plaintiff/ Respondent relies on the judicial decision of *Juja Coffee Exporters Limited & 3 Others v Bank of Africa Limited & 6 others* (citation not given) in support of his submissions.
92. On the sixth issue, the Plaintiff/Respondent submits that the High Court does not have jurisdiction to hear and determine this matter and reiterates that the prayers sought in the Plaint fall within the jurisdiction of this Court.
93. The Plaintiff/Respondent submits that the Defendant/Applicant in his Counterclaim is challenging the statutory power of sale on the ground of fraud. He relies on *Juja Coffee Exporters Limited & 3 Others v Bank of Africa Limited & 6 others* (citation not given) and submits that the Court held that the Environment and Land Court has the jurisdiction to determine matters challenging the statutory power of sale on the grounds of fraud.
94. It is the Plaintiff/Respondent's submissions that the judicial decisions relied on by the Defendant/Applicant were decided on a narrow conflict between the chargee and the Chargor before the chargee exercised its statutory power of sale and transferred the chargor's land to a third party. He adds that the prayers sought in the said suits were not linked to land use or disputes over title or possession of land. It is his submissions that the said authorities are therefore distinguishable from this case.
95. The Plaintiff/Respondent concludes his submissions by urging the Court to dismiss the Defendant/Applicant's application.
96. The 1st Defendant/Respondent in the Counterclaim submits on the following issues;
- a. Whether this Honourable Court can review, vary, set aside and or vacate the High Court's orders given on 16th October, 2023 transferring this matter to this Honourable Court.
 - b. Whether this Honourable Court has jurisdiction to hear and determine this matter.
 - c. Who should bear the costs of the application.
97. On the first issue, the 1st Defendant/Respondent submits that on 16th October, 2023 parties in this suit appeared before Justice Sergon of the Kericho High Court who considered the matter and transferred it to this Court with the consent of the advocates present.
98. The 1st Defendant/Respondent relies on Order 45 Rule 3(1) of the Civil Procedure Rules and submits that the Defendant/Applicant is guilty of laches in bringing the application for review on an issue his Advocates consented to.
99. The 1st Defendant/Respondent also submits that the application under consideration has not met the threshold of granting the prayers sought as provided for under Order 45 Rule 1 of the Civil Procedure Rules.
100. The 1st Defendant/Respondent further submits that Kericho High Court is the proper Court to consider the prayer seeking an order for review pursuant to the provisions of Order 45 Rule 1(b) of the Civil Procedure Rules.
101. On the second issue, the 1st Defendant/Respondent submits that the authorities the Defendant/Applicant is alleging to have discovered do not raise common issues for determination with the instant suit.
102. The 1st Defendant/Respondent also submits that the application under consideration is an afterthought as the Defendant/Applicant's Counsel consented to the jurisdiction of this Court to hear and determine the matter.



103. The 1st Defendant/Respondent further submits that the prayers sought in the parties' pleadings are centralized on ownership, sale, possession and vacant possession of the suit property which is within the jurisdiction of this Court.
104. The 1st Defendant/Respondent relies on Article 162(2)(b) of *the Constitution* of Kenya and submits that the Court should determine the primary course of action in this matter by invoking the predominant purpose test as was set out in the judicial decisions of China Development Company Limited & another vs Kayser Investment Limited (Commercial Appeal E089 of 2021) [2023] KEHC 17279(KLR) (Commercial and Tax) (12 May 2023) (Ruling) and Midland Properties Investment Ltd v Masinde Muliro University of Science and Technology [2020] eKLR.
105. The 1st Defendant/Respondent submits that the Court of Appeal in Civil Appeal No. 143 of 2006 in its judgement delivered on 31st July, 2015 stated that the dispute in the present matter is on ownership of the suit parcel and it should be heard and tried on a priority basis by any other judge with jurisdiction except for Justice M. G Mugo.
106. The 1st Defendant/Respondent also submits that on 31st July, 2023 the High Court found that it did not have jurisdiction to hear and determine the matter and therefore the said Court is functus officio on the issue of jurisdiction.
107. The 1st Defendant/Respondent submits that this Court has jurisdiction to hear and determine the matter and urges the Court to dismiss the Defendant/Applicant's application with costs.
108. The Defendant/Applicant in his submissions filed in response to the Plaintiff/Respondent and 1st Defendant/Respondent's submissions, relies on Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Article 162 (2) & (3) of *the Constitution* of Kenya, Section 13 of the *Environment and Land Court Act*, Order 51 Rule 15 of the Civil Procedure Rules and submits that the authorities relied on by the Plaintiff/Respondent on review are not applicable for the application under consideration.
109. The Defendant/Applicant reiterates that the delay in filing the present application is attributed to the discovery of various authorities in November, 2024 that addressed the jurisdiction of the Environment and Land Court.
110. The Defendant/Applicant relies on the judicial decision of Owners of Motor Vessel Lilian S vs Caltex Oil (K) Ltd (1989) KLR and reiterates that jurisdiction is everything, without it the Court can do nothing other than downing its tools.
111. The Defendant/Applicant also reiterates that the Plaintiff/Respondent has contributed to the delay in the hearing and determination of this matter.
112. The Defendant/Applicant submits that the course of action in a matter stems from the issues for determination which are ascertained when one looks at the Plaint, the defence (s) and Counterclaim.
113. The Defendant/Applicant also submits that the Counterclaim it filed has a life of its own and relies on his earlier filed submissions. He reiterates that it is the High Court that has the jurisdiction to hear and determine this matter.
114. The Defendant/Applicant reiterates his earlier filed submissions and urges the Court to allow his application as prayed.

Analysis and Determination

115. I have considered the Defendant/Applicant's application, the response thereto, the further affidavit and submissions.



116. It is my view that the following issues arise for determination;
- a. Whether this Court should review the orders issued on 16th October, 2023.
 - b. Whether this Court has jurisdiction to hear and determine this suit.
 - c. Whether the proceedings already undertaken in the suit should be expunged from the Court record.
 - d. Who should bear costs of the application.

A. Whether this Court should review the orders issued on 16th October, 2023.

117. Section 80 of the *Civil Procedure Act* provides as follows;

“Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

118. Order 45 Rule 1 and 2 of the Civil Procedure Rules provides as follows;

“(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.”

119. In the judicial decision of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR the Court held as follows;

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not



be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

120. As was held in Republic v Public Procurement Administrative Review Board & 2 others (supra) cited above, the Court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.
121. The Defendant/Applicant is seeking that this Court reviews the order issued on 16th October, 2023 which order transferred this matter from the High Court to the Environment and Land Court.
122. The Defendant/Applicant contends that the issues raised in the present suit arise from a charge over a property which was allegedly sold without the issuance of the requisite statutory notices. It is the Defendant/Applicant’s contention that the dispute in this suit is commercial in nature and does not therefore fall within the jurisdiction of the Environment and Land Court.
123. The Defendant/Applicant also contends that he discovered authorities to that effect sometime in November, 2024 hence the filing of the application under consideration around that time.
124. Both the Plaintiff/Respondent and the 1st Defendant/Respondent in the Counterclaim contend that the orders issued on 16th October, 2023 were granted in the presence of Counsel for the Defendant/Applicant.
125. They also contend that the said orders were issued by the High Court and therefore the application for review ought to have been filed before the High Court.
126. A perusal of the Court record shows that 16th October, 2023 the matter was mentioned before Hon. Justice (Dr) J. K Sergon in the presence of Counsel for the Plaintiff/Respondent and the Defendant.
127. The Court made the following order;

“This matter is transferred to ELC Court, Kericho for hearing and determination. This matter is fixed for mention on 7th November, 2023 for further orders and directions by the ELC Court, Kericho”

128. It is not disputed that the order issued on 16th October, 2023 was made by the High Court Judge, Kericho.
129. In the judicial decision of Muiyoro *¶ 3 others v Mwaura ¶ another (Environment and Land Miscellaneous Application 4 of 2023)* [2024] KEELC 1734 (KLR) (11 April 2024) (Ruling) the Court held as follows;

“13. Secondly, the Application asks this Court to review a decision rendered by a Court of equal status. Such a course of action is procedurally irregular, as Courts of equal standing lack the legal authority to review decisions made by their counterparts. This was echoed by the Court of Appeal in *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties)* [2018] KECA 330 (KLR) where it was stated thus;



“14. I have no difficulty upholding the learned Judge’s holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of Courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that Court or of the superior Courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of *the Constitution* in these terms;

“The High Court has supervisory jurisdiction over the subordinate Courts and over any other person, body or authority exercising a judicial or quasi judicial function, but not over a superior Court.” [Emphasis Mine]

130. In the above cited judicial decision, the Court held that Courts of equal status lack the legal authority to review orders made by their counterparts.
131. In the present case, it is my view that this Court sitting as an Environment and Land Court does not have the jurisdiction to review the order issued on 16th October, 2023 by the High Court.

B. Whether this Court has jurisdiction to hear and determine this Suit.

132. As afore stated, the Defendant/Applicant contends that the predominant question in the present suit relates to failure to issue statutory notices before the sale of the suit property which was charged to the 1st Defendant/Respondent in the counterclaim.
133. The Defendant/Applicant also contends that the said question is commercial in nature and therefore this Court has no jurisdiction to hear and determine the suit.
134. The Defendant/Applicant further contends that he was not aware of the said position until sometime in November, 2024 when his Counsel on record came across various judicial authorities which held that it is the High Court that has the jurisdiction to hear contested issues on charges.
135. The Plaintiff/Respondent contends that the Defendant/Applicant is inviting this Court to only consider his cause of action as set out in his Defence and Counterclaim. He further contends that his Plaint should also be considered in determining the question of jurisdiction.
136. The Plaintiff/Respondent submits that in the Plaint, he avers that he is the registered owner of the suit parcel and that the Defendant/Applicant has interfered with his right to quiet possession.
137. The Plaintiff/Respondent also submits that the Statement of Defence dated 16th January, 2004 is a mere denial of his claim in the Plaint and therefore his claim falls under the jurisdiction of the Environment and Land Court.
138. The Plaintiff/Respondent and the 1st Defendant/Respondent in the counterclaim contend that in matters where issues partly fall within the jurisdiction of the High Court and partly within the jurisdiction of the Environment and Land Court, the Court should apply the predominant purpose test.
139. They submit that the issues in this matter fall within the jurisdiction of the Environment and Land Court.



140. This Court is established under Article 162 (2) (b) of *the Constitution* of Kenya which states;

- “(2) 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.”

141. Section 13 of the *Environment and Land Court 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.
- (5) Deleted by *Act No. 12 of 2012*, Sch.
- (6) Deleted by *Act No. 12 of 2012*, Sch.
- (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”

142. As stated in the foregoing paragraphs, on 16th October, 2023 the matter was mentioned before the High Court by Hon. Justice (Dr) J.K Serگون. Counsel present on the said date were Mr. Owino for the Plaintiff and Miss. Gachuhi for the Defendant.

143. The court record captures the proceedings for the said date as follows;

“Mr. Owino; This matter was transferred to Kericho from Nairobi. This matter lies within the ELC. I pray for the same to be transferred to the ELC Court.

Miss Gachuhi; No objection.

Court; This matter is transferred to ELC Court, Kericho for hearing and determination. This matter is fixed for mention on 7th November, 2023 for further orders and directions by the ELC Court Kericho.”

144. The 1st Defendant/Respondent in the counterclaim’s grounds of opposition states that the Defendant’s legal representatives at all times consented to the jurisdiction of this Honourable Court to hear and determine the matter.

145. I would like to point out that jurisdiction of the Environment and Land Court is conferred by *the Constitution* and statute and not consent of the parties. The decision of the Supreme court of Kenya in Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & others (2012) eKLR offers useful guidance. It is 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...” (Emphasis mine)

146. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another[2018] eKLR states as follows ;

17. 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.”
18. It follows that even where a party initially admits to jurisdiction, as in this case, the same does not clothe a court with jurisdiction it did not have to begin with. Similarly, an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection ideally should be raised at the earliest opportunity...” (Emphasis mine)
147. Similarly, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal stated thus;
- (44) “.... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...”[Emphasis Mine]
148. All these decisions are intended to resolve the contention by the 1st Defendant/Respondent in the counterclaim/Respondent that the Defendant/Applicant’s legal representatives at all times consented to the jurisdiction of this Honourable Court to hear and determine the matter.
149. No amount of consent can clothe this court with jurisdiction if it indeed has none. This is to say that the question of Jurisdiction as raised by the Defendant/ Applicant is not idle and must be determined by this court on its merits.
150. Having said that, I shall now substantively delve into the question whether or not this court has jurisdiction to hear and determine this suit.
151. The following are not contested:
- a. There exist two suits; the main suit and the counterclaim.
 - b. The Plaintiff in the main suit seeks to assert his right of ownership over the suit parcel and in so doing seeks orders that the Defendant grants him vacant possession i.e. that the Defendant be evicted from the suit parcel.
 - c. The Defendant, on the other hand has filed a counterclaim wherein he has joined Kenya Commercial Bank as the 1st Defendant and the Plaintiff in the main suit as the 2nd Defendant. In his counterclaim, he seeks a declaration that the sale of the suit property to the Plaintiff (now 2nd Defendant) by the 1st Defendant (Kenya Commercial Bank) is void ab initio.
152. My understanding is that the Plaintiff/Respondent’s claim to the suit property stems from the sale to him by the Kenya commercial Bank in exercise of its rights as a chargee.
153. The Defendant/Applicant in his counterclaim takes issue with the validity of the sale to the Plaintiff/ Respondent and seeks a determination on the legality of the charge and service of statutory notices before a sale and transfer of title to the Plaintiff/Respondent.
154. In *Mturi & another v Diamond Trust Bank Kenya Limited (Environment & Land Case E54 of 2023)* [2024] KEELC 6167 (KLR) (26 September 2024), the Learned Judge cited with approval the decision



in *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR, and stated thus;

“The position is further elaborated by this Court in the case of *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR, Ombwayo J, having analyzed the averments in the plaint in a matter before him, stated as follows: “The substratum of the suit therefore relates to the legal charges and the subsequent statutory power of sale. The Court that has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the chargee has since been settle by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others* [2017]eKLR where the court held as follows.....”Significantly, he proceeded to state:

“The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.” [Emphasis Mine]

155. In the present suit, the Respondents have urged this court to invoke the predominant purpose test and find that this court has jurisdiction to hear and determine this suit. The test was explained in the case of *Suzanne Butler & 4 Others v Redhill Investments & Another* [2017] eKLR 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. 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.”

156. Taking the pleadings into consideration, it is apparent that the issuance of an order that the Defendant/Applicant grants vacant possession of the suit property to the Plaintiff/Respondent cannot be determined before the question of legality of the charge, service of statutory notices and sale is determined.

157. The legality of the process pursuant to which the suit parcel was transferred to the Plaintiff/Respondent must first be interrogated before orders of vacant possession can be granted.

158. The process that culminated to ownership by the Plaintiff/Respondent as read from the pleadings, was that the Chargee (1st Defendant/Applicant in the counterclaim) exercised its power of sale over the Chargor’s property (Defendant/Respondent herein). A consequence of the exercise of the Chargee’s power of sale, is that the Plaintiff/Respondent purchased the suit property and he now seeks vacant possession.



159. In *Co-operative Bank of Kenya Ltd Vs Patrick Kangethe Njuguna and five others* (2017) eKLR the Court of Appeal found that the jurisdiction of the Environment and Land Court to determine disputes connected to “use” of land within the meaning of Article 162(2)(b) of *the Constitution* of Kenya, 2010 does not include mortgages, charges, collection of dues and rents and that these are within the Civil Jurisdiction of the High Court.
160. My view is that once the question of legality of the charge is resolved, nothing is easier than making an order for or against granting vacant possession of the suit property.

C. Whether the proceedings already undertaken in the suit should be expunged from the Court record.

161. Given my determination on issue (b) above, I find in the affirmative.

D. Who should bear costs of the application

162. The general rule is that costs shall follow the event in accordance with the Provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

163. Taking the foregoing into consideration, I find that the Defendant/Applicant’s application dated 15th November, 2024 is merited. Consequently, I declare and order as follows:
- a. The Environment and Land Court lacks jurisdiction to hear and determine this suit.
 - b. The proceedings that have taken place before the Environment and Land Court are a nullity and are hereby expunged from the Court record.
 - c. This file shall be placed before the Presiding Judge of the High Court sitting at Kericho for further directions.
 - d. The cost of this application shall be in the cause.

164. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 12TH DAY OF MAY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of:

Mr. Mwangi Mburu for Sumba for the Defendant/Applicant

Dr. Omondi Oumo for the Plaintiff/Respondent.

Miss Gatuhi for the 1st Defendant in the counterclaim/Respondent.

Court Assistant; Mr. Joseph Makori.

