



**Dominic & 3 others v County Government of Narok & another (Constitutional
Petition E002 of 2023) [2023] KEHC 17908 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION E002 OF 2023**

F GIKONYO, J

APRIL 17, 2023

BETWEEN

KOSOE KAYIOK DOMINIC 1ST PETITIONER

LEMANYATTA OLE LIARAM 2ND PETITIONER

ANTONY OLE ROTIKEN 3RD PETITIONER

MAITAI PARIKEN DANIEL 4TH PETITIONER

AND

THE COUNTY GOVERNMENT OF NAROK 1ST RESPONDENT

THE COUNTY ASSEMBLY OF NAROK 2ND RESPONDENT

RULING

The Petition

1. The petitioners filed the instant petition dated 27/02/2023 seeking to challenge the formulation, approval and / or adoption for implementation of following three plans;
 - i. Maasai Mara management plan;
 - ii. The greater Mara eco system management plan; and
 - iii. Narok county physical and land use development plan
2. On 28/02/2023, in considering a Notice of Motion dated 27/02/2023, the court inter alia directed parties to address it on its jurisdiction to entertain the instant petition.
3. The 2nd respondent also filed a notice of preliminary objection dated 9/03/2023 challenging court's jurisdiction to hear and determine a petition of this nature.



The petitioners' submissions

4. The petitioners submitted that it is only the high court and not the environment and land court that is constitutionally enabled to look into the complained conduct and actions of state organs and determine whether the same are inconsistent and/or contravenes the provisions of *the constitution*. There is no provisions of *the constitution* and/or statute that grants such ability to the environment and land court.
5. The petitioners submitted that the provisions and / or the contents of the three plans are not in dispute before this court. The petitioner's primary complaint is on the process employed by the respondents' in approving and / or adopting for implementation the three plans. What is in dispute is the constitutionality of the conduct and acts of the respondents while approving and/ or adopting the three plans and not the three plans themselves. None of the complaints relate to land or environment dispute.
6. The petitioners submitted that the substratum of the dispute before this court is whether there was sufficient public participation in the approval and adoption of the three plans.
7. The petitioner has relied on the following authorities;
 - i. [*Mohamed Ali Baadi and Others v Attorney General & 11 Others \[2018\]*](#) eKLR
 - ii. [*Law Society of Kenya v Federation of Kenya Employers \[2021\]*](#) eKLR
 - iii. [*Said Ali Bidu & 5 Others v Twalib Abdalla Mbarak, Chief Executive Officer, Ethics and Anti-Corruption Commission & 3 Others; Mombasa County Government & Another \(Interested Parties\) \[2021\]*](#) eKLR
 - iv. *Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & Another (Interested Parties)* eKLR
 - v. *Republic v Chief Land Registrar & 3 Others [2018]* eKLR
 - vi. [*Juma Nyamawi Ndungo & 5 Others v Attorney General; Mombasa Law Society \(Interested Party\) \[2019\]*](#) eKLR
 - vii. [*Leisure Lodges Ltd v. Commissioner Of Lands and 767 Others \[2016\]*](#) eKLR
 - viii. *Republic Vs Karisa Chengo & 2 Others (2017)* eKLR
 - ix. *Republic v Principal Secretary Agriculture, Livestock and Fisheries & 3 Three Others Ex Parte Douglas M. Barasa, Collins Wafula Makunja and Richard Wamalwa Makhino*
 - x. [*Patrick Musimba v National Land Commission & 4 Others \[2015\]*](#) eKLR
 - xi. [*Sollo Nzuki Vs Salaries and Remuneration Commission & 2 Others \(2019\)*](#) eKLR
 - xii. [*Ole Tauta & Others Vs Attorney General \[2015\]*](#) eKLR
 - xiii. *National Land Commission & 2 Others; Kakuzi Division Development Association & 6 Others (Interested Parties) Ex Parte: Kakuzi PLC*
 - xiv. [*Patrick Musimba v National Land Commission & 4 Others \[2015\]*](#) eKLR
 - xv. *Cortex Mining Kenya Limited Vs Cabinet Secretary Ministry of Mining & Others*



- xvi. [*Kenya Universities Staff Union v University Council of Masinde Muliro University of Science and Technology & 2 Others \[2018\]*](#) eKLR
- xvii. Prof. Daniel N. Mugendi Vs Kenyatta University & Others [2013] eKLR
- xviii. Wycliffe Amukowa & 2 Others v Machakos University [2022] eKLR
- xix. Abdalla Mbarak, Chief Executive Officer, Ethics and Anti-Corruption Commission & 3 Others; Mombasa County Government & Another, A.W.G. V D.N.K. & Another [2022] eKLR
- xx. National Land Commission & 2 Others; Kakuzi Division development Association & 6 Others (Interested Parties) Ex Parte: Kakuzi PLC and Worldwide Freighters Ltd & 19 Others 9suing On Their Behalf And 2000 Others Residents Of LR 12610/1 Mavoko) v Attorney General & 3 Others; Deliverance Church Registered Trustees(Interested Party) [2019] eKLR

2nd respondent's submission

- 8. The 2nd respondent submitted that the environment and land court, employment and labour relations court and high court are of equal status. The 2nd respondent's preliminary objection is that the subject matter of the instant petition falls under the jurisdiction of the environment and land court. This court is devoid of the requisite jurisdiction to hear and determine this petition on its merits and demerits. Therefore, this court should dismiss this instant petition dated 28/02/2023 in its entirety with costs.
- 9. The 2nd respondent relied on the following authorities;
 - i. Mukisa Biscuit Manufacturing Co. Ltd Versus West End Distributors Ltd (1969) EA 696.
 - ii. Owner of the Motor Vessel" Lilian s' Versus Caltex Oil(Kenya) Limited [1989] KLR 1
 - iii. Benson Makori Makworo Vs Nairobi Metropolitan Services & 2 Others [2022] eKLR
 - iv. Samuel Kamau Macharia and Another Vs Kenya Commercial Bank Limited & 2 Other [2012] eKLR
 - v. Republic v County Ex Parte Raphael Ngigi Muiruri
 - vi. Republic Vs Karisa Chengo & 2 Others (2017) eKLR
 - vii. In The Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 Of 2011.
 - viii. Kadiro Jiilo Hirbo v Diana Murungi and Vincent Simba (Being sued on their own behalf and on behalf of Fedha Estate Residents Association; County Government Of Nairobi (Interested Party) [2020] eKLR
 - ix. The Supreme Court in Samuel Kamau Macharia & Another Versus Kenya Commercial Bank Limited & 2 Others [2012] eKLR
 - x. Article 162(20 (b) The [*Environment and Land Court Act*](#)
 - xi. Elc 63 Of 2017 Christopher Ngusu & 28 Others Versus the County Government Of Kitui & Anor
 - xii. Civil Appeal No. 6 Of 2012 Prof. Daniel n. Mugendi Versus Kenyatta University & 3 Others



- xiii. Nai Civil Application No. 375 Of 1996(Ur) Rafiki Enterprises Limited Versus Kings Way Tyres And Gatumart Limited Cited The Case Of Alphonse Mwangemi Munga & Others Vs African Safari Club Ltd[2008] eKLR
- xiv. H.c. App. No. 15 Of 2012 Josiah M.R. Kariuki Versus Simon Gichangi Kabugi
- xv. Section of [Civil Procedure Act](#)
- xvi. Halsbury’s Laws of England, 4th Edition(Re-Issue), {2010}, Vol. 10 Para 16

Analysis And Determination.

Issue

- 10. The major issue in this ruling is: -
 - i. Whether this court has jurisdiction to hear and determine this petition. Arguments that this matter falls within the exclusive jurisdiction of the Environment and Land Court (ELC) shall be duly considered.

Jurisdiction

- 11. The relevant provisions of the law on jurisdiction for purposes of this ruling include; Article 165(3) & (6), 162 of [the Constitution](#), and section 13 of the [Environment and Land Court Act](#).
- 12. Article 165(3) and (6) sets out the jurisdiction of the High Court as follows:
 - (3) 3) Subject to clause (5), the High Court shall have —
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.



- (6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.
13. Article 162(2) and (3) provides as follows: -
- (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.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
14. The legislation contemplated under Article 162(3) was enacted and is the [Environment and Land Court Act](#).
15. Section 13 thereof outlines the jurisdiction of the Environment and Land Court as follows: -
- (1) The Court shall have original and appellate jurisdiction to hear and determine all dispute 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](#). (emphasis added)
16. At the risk of sounding mundane, the jurisdiction of the specialized Courts in article 162(2) of [the Constitution](#) has been determined with finality in the famous Karisa Chengo & 2 others v Republic case. The Court of Appeal in Karisa Chengo & 2 others v Republic Civil Appeal Nos. 44, 45 & 76 of 2014 observed as follows: -

The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in [the Constitution](#) for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment



... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in *the Constitution* of a statement on the status of the specialized Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court.....

17. The matter was appealed to the Supreme Court in Petition No. 5 of 2015 Republic vs. Karisa Chengo & 2 Others. The Supreme Court rendered itself as follows: -

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

(51)

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

(79) It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of *the Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).



18. The foregoing is the obtaining legal position.
19. The matter, however, does not end there. A further problem seem to arise. It was on the cases raising 'cross-cutting' or 'cocktail' or 'mixed grill' issues within either Courts.
20. Initially there were two schools of thought in the High Court on the matter. One school favoured the 'pre-dominant purpose test' whereas the other school rooted for the 'pre-dominant issue or subject matter before Court test'.
21. The proponents of the former include Ngugi, J (as he then was) who rendered himself in *Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another* as follows:
 23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
 24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.
22. My readings of Munyao, J below was not really an abrogation of the pre-dominant purpose test, but an additional test as it is not in all cases the pre-dominant purpose test is apt- especially in squirmy cases. In *Lydia Nyambura Mbugua vs. Diamond Trust Bank Kenya Limited & Another* the Learned Judge argued as follows: -
 25. On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.



23. The Court of Appeal had an occasion and dealt with the issue. In *Co-operative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna & 5 others*, the Court dealt with the issue as follows: -

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

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

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

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

25. The foregoing discussion is healthy, and noting the observations by Munyao J, there are scary-edge cases which may not totally or squarely fall within one or other of the tests proposed by the various courts I have analyzed.

26. Be that as it may, according to the petitioners, the dominant dispute herein is whether there was public participation in respect of formulation and adoption of the three plans.

27. The court is aware that public participation is one of the ways the people exercise their sovereign authority in public decision-making. Yet, stakeholder frameworks for purposes of public participation in, are instigated by relevant institutional bodies of decision-making. Therefore, it is imperative that, in formulating stakeholders' frameworks for purposes of public participation, the institutional bodies concerned, should ensure the designs of decision-making process and content do not delineate only a segment of the public whom they consider relevant, but capture all relevant stakeholders who are both addressees of the decisions and articulators of expectations via decision-making processes. At least the structural features and content elements of the frameworks must be capable of reaching the target audience and facilitative of their actual and effective participation; and of course, disseminating the core substance of the intended decision or action, and the final product or decision in real time.

28. This court has jurisdiction to the extent of the claim that there was no public participation in the formulation and adoption for implementation of the three plans. Nevertheless, the manner the petition is drawn and the nature of the subject matter, makes it most likely that substantive matters on environmental protection and management, as well as land use will emerge as part of the design framework for effective public participation processes thereto. I note the petition has alluded to the purpose and content of the plans herein.

29. Contrary to the submissions by the petitioners, nothing in *the Constitution* which precludes the Environment and Land Court from hearing and determining applications for redress of a violation of *the Constitution* or



a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to or arising from a matter that falls within its jurisdiction.

30. It should, therefore, be observed that where courts have concurrent jurisdiction, it may be prudent to borrow from the Use of Force cases model, that, the inherent powers of the court include that of not exercising a jurisdiction that it has in order to protect the integrity of the judicial processes, in this case ordained in *the Constitution*, and defer to the jurisdiction of the court with jurisdiction on the primary subject matter as well as the purpose of the core subject matter in the litigation. This is not purely a matter of preferred choice but exercise of discretion depending on the circumstances of each case.
31. For reasons stated above, this is one case where this court and ELC have concurrent jurisdiction but ELC is more suited to deal with the dispute completely even on the technical and substantive matters of environmental protection, use and management, and land use for effective public participation frameworks and designs. A perfect case to decline jurisdiction. Accordingly, this court declines to exercise jurisdiction and refers the case to ELC judge at Narok for directions, hearing and disposal. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 17TH DAY OF APRIL, 2023.

F. GIKONYO M

JUDGE

In the presence of:

Barasa for petitioners

Tuya for Ms. Maritim for 1st Respondent

Onsongo for Maina for 2nd Respondent

Court Assistant – Mr. Kasaso

