



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 77 OF 2019

HONEY CREEPERS INVESTMENT LIMITED.....PETITIONER

VERSUS

CAB INVESTMENTS COMPANY LTD.....1<sup>ST</sup> RESPONDENT

COUNTY GOVERNMENT OF NAIROBI.....2<sup>ND</sup> RESPONDENT

NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT

THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT

HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

RULING

1. Honey Creepers Investment Limited is the Petitioner. Cab Investments Company Limited; County Government of Nairobi; National Land Commission; the Chief Land Registrar; and the Hon. Attorney General are the respective 1<sup>st</sup> to 5<sup>th</sup> respondents.
2. This ruling seeks to determine whether this Court has jurisdiction to entertain this petition. When the matter was first placed before me on 25<sup>th</sup> March, 2019, I directed the parties to address the Court on the issue of jurisdiction.
3. Subsequently the 4<sup>th</sup> and 5<sup>th</sup> respondents filed grounds of opposition dated 25<sup>th</sup> March, 2019 and raised the issue of jurisdiction in one of the grounds as follows:-

**“THAT under Section 13(2) of the Environment and Land Court Act, 2011, this is a matter that should be entertained by the Environment and Land Court and not the Constitutional and Human Rights Court. Therefore the matter has been filed in a wrong forum and Court should down its tools.”**

4. The 2<sup>nd</sup> Respondent likewise objected to the jurisdiction of this court through the notice of preliminary objection dated 17<sup>th</sup> April, 2019 on the grounds that:-

**a. The Petition herein discloses a purely ordinary land dispute which is disguised as a constitutional issue contrary to clear statutory procedures laid down in the Civil Procedure Act and it is an abuse of the Court Process.**

**b. The present Petition hinges principally on matters related to management, usage and determination of title to land and therefore should be filed in the Environment and Land Court and not this Honourable Court.**

**c. The provisions of Article 162(2) and 165(5) of the Constitution of Kenya as read together with Section 4 and 13(2) of the Environment and Land Act are contravened therefore an abuse of the process of the court.**

**d. The Petition as filed does not expressly disclose any infringement of the fundamental rights of the Petitioner pertaining to land by the respondents.**

**e. The malady of wrong jurisdiction is so grave an error that it is irredeemably incurable even by the Oxygen (O2) Rule provided under the dint of Article 159 of the Constitution.**

**f. Civil remedies would be available to the Petitioner and the said Petitioner has not contended that this court in exercise of its jurisdiction is unable to award it any remedy at all should it be successful or that the remedies known in law are either inadequate, non-existent or unconstitutional.**

5. The Petitioner, as shall shortly be demonstrated, is of the firm view that this Court has jurisdiction to entertain this petition.

6. Through submissions filed on 9<sup>th</sup> May, 2019 counsel for the 1<sup>st</sup> Respondent states that the petition is centred on the purported unlawful and irregular occupation, and illegal acquisition of the Petitioner's parcel of land known as Nairobi Block Land Reference Number 209/14392 – Nairobi by the 2<sup>nd</sup> Respondent. Counsel, however, concedes that the Petitioner also alleges contraventions of various constitutional rights.

7. On the question as to whether this Court has jurisdiction to hear and determine this petition, counsel for the 2<sup>nd</sup> Respondent submits that a court without jurisdiction cannot entertain the matter before it. For this statement of law the Court is referred to the celebrated decision in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] KLR 1** ("Lillian S") as cited with approval in **Leisure Lodges Ltd v Commissioner of Lands & 767 others [2016] eKLR**.

8. Counsel then proceeds to identify Article 162(1) and (2) of the Constitution as establishing Courts with status of the High Court to hear and determine matters relating to employment and labour relations, and environment and the use and occupation of, and title to land. According to counsel, Article 165(5)(b) of the Constitution expressly denies the High Court jurisdiction in respect of matters reserved for the Courts established under Article 162(2).

9. It is the submission of counsel for the 2<sup>nd</sup> Respondent that sections 4 and 13 of the Environment and Land Court Act, 2011 ("E&LC Act") establishes the Environment and Land Court ("E&LC") which has original and appellate jurisdiction to hear and determine all disputes under Article 162(2)(b) of the Constitution and the E&LC Act. Further, that Section 13 of the E&LC Act expressly empowers the E&LC to hear issues touching on a denial, violation, or infringement of or threat to, rights and fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. Counsel points out that these are some of the Articles upon which the Petitioner has premised its petition.

10. Counsel urges this Court to find that the jurisdiction of the E&LC was correctly stated by Munyao Sila, J in **Mohammed Said v County Council of Nandi [2013] eKLR** when he held that the High Court has no jurisdiction to delve into matters reserved for the Courts of equal status.

11. As to the fate of the instant petition, counsel submits that the same should be dismissed. His position is that this Court has no jurisdiction to transfer the suit to a Court with jurisdiction. Reliance is placed on the decision of the Court of Appeal in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR** in support of the proposition that a court lacking jurisdiction cannot transfer a matter to a court with jurisdiction.

12. Through the submissions dated 17<sup>th</sup> February, 2020, counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents take a similar position with the 2<sup>nd</sup> Respondent on the question of jurisdiction. Counsel states that the Petitioner's claim before this Court is that he is the *bona fide* owner of land parcel L. R. No. 209/14392 Nairobi and his rights to property have been violated by the respondents.

13. Counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents contend that the issues raised in the petition have been reserved for the E&LC by Article 162(2) (b) of the Constitution and Section 13(2) of the E&LC Act. It is therefore his view that the dispute before this Court belongs to the E&LC. In support of his argument that this Court has no jurisdiction to entertain this petition, counsel cites the decisions in **Fredrick Kivuti & 22 others v Secretary County Government of Embu & 2 others [2018] eKLR**; **Kenya Urban Roads Authority v Ministry for Roads & another [2017] eKLR**; and **Republic v Chief Land Registrar & another [2019] eKLR**. It is counsel's view that from the cited decisions it is clear that the E&LC has powers to determine questions of violation of rights under the Constitution. Further, that Section 13(7) of the E&LC Act empowers the E&LC to grant any relief it deems fit and just, including award of damages, compensation, restitution, declaration and specific performance. The Court is therefore asked to allow the 4<sup>th</sup> and 5<sup>th</sup> respondents' preliminary objection and down its tools.

14. The Petitioner through the submissions dated 28<sup>th</sup> June, 2019 takes a contrary view on the issue of jurisdiction. Counsel for the Petitioner commences his submissions by giving a factual background as to how the Petitioner acquired L. R. No. 209/14392-Nairobi before the 2<sup>nd</sup> Respondent unlawfully, irregularly and illegally possessed and occupied the parcel of land.

15. On the question of the jurisdiction of this Court to hear the petition, counsel submits that the germane issue or the substratum of the petition herein is the violation of the Petitioner's fundamental rights and freedoms anchored under Articles 2(4), 25, 40, 27, 47 and 50 of the Constitution. Counsel then proceeds to state how the Court is called upon to determine if these provisions were violated.

16. Counsel for the Petitioner asserts that as held by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** the jurisdiction of a court is granted by the Constitution or legislation or both. He points to Article 23(1) of the Constitution as granting this Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Further, that Article 165(3)(6) grants the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or

threatened. Merging Articles 165(3)(b) and 23 of the Constitution counsel submits that the High Court as presently constituted is conferred with exclusive jurisdiction to hear and determine matters relating to infringement, violation or threat to constitutional rights.

17. Counsel for the Petitioner stresses that the jurisdiction of the High Court is donated by the Constitution and its jurisdiction cannot be limited by an Act of Parliament because such an Act will fly in the face of Article 2(4) of the Constitution on the supremacy of the Constitution vis-à-vis other laws. Further, that by virtue of Section 3(1) of the Judicature Act, the jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be exercised in conformity with the Constitution. Counsel for the Petitioner therefore takes the firm view that because the Constitution has provided for the establishment of the High Court and its jurisdiction, the letter and spirit of Section 3 of the Judicature Act would mean that no statute can limit the jurisdiction of the High Court.

18. Turning to the E&LC, counsel for the Petitioner asserts that although the Court is established under Article 162 of the Constitution, it derives its jurisdiction not from the Constitution but from a statute namely the E&LC Act. Counsel concedes that the introduction of Section 13(3) to the E&LC Act by Act No. 12 of 2012 did indeed grant the E&LC jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. He, however, contends that the amendment limits the Court's jurisdiction to the hearing and determination of petitions on denial, violation or infringement of, or threat to, rights or fundamental freedoms in as far as Articles 42, 67 and 70 of the Constitution are concerned and not anything more. It is his position therefore that Section 13(7) of the E&LC Act must be read together with Section 13(3) of the same Act. Counsel states that the petition before this Court does not relate to the Articles stated in Section 13(3) and as such, the E&LC does not have jurisdiction to hear the petition, which in his opinion has been presented before the proper forum.

19. Counsel supports his submissions by citing the following authorities: **Ledidi Ole Tauta & others v Attorney General & 2 others [2015] eKLR; Patrick Musimba v National Land Commission & 4 others [2015] eKLR; Leisure Lodges Ltd v Commissioner of Lands & 767 others [2016] eKLR; Musk Deer Limited v Benjamin K. Kipkurui & another [2018] eKLR; and Republic v Karisa Chengo & 2 others [2017] eKLR.** According to counsel for the Petitioner, all the cited cases confirm that where the Constitution has expressly donated jurisdiction to the High Court to hear certain matters, that jurisdiction cannot be transposed to the E&LC. His firm position is that it is the High Court which has jurisdiction to hear this petition as the E&LC's jurisdiction is limited by Section 13(3) of the E&LC Act. Further, that the cited decisions and in particular **Karisa Chengo** (supra) affirm that the E&LC is not the High Court envisaged under Articles 23 and 165 of the Constitution and on that basis alone it has no jurisdiction to entertain the present petition.

20. Additionally, counsel for the Petitioner contends that the E&LC Act cannot confer jurisdiction on the E&LC which is not the High Court to hear matters on violation of rights and fundamental freedoms as the E&LC Act itself is inferior to the Constitution by dint of Article 2(4) of the Constitution and any such purported conferment is a nullity.

21. From the pleadings and submissions, it is clear that the only issue for the determination of this Court is whether it has jurisdiction to hear and determine the instant petition.

22. Before I delve into the substantive issue I need to state something about the fact that the Petitioner appears to be unhappy with the decision of this Court to raise the issue of jurisdiction *suo moto*. In "**Lillian S**" it was held that the issue of jurisdiction can either be raised by the court on its motion or by the parties. In that regard the Court held that:-

**"It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court."**

I presume that provides an answer to the Petitioner's concern with the decision of this Court to raise the question of jurisdiction on its own motion. Parties cannot by consent confer jurisdiction on a court or tribunal and neither can their silence allow a court or tribunal to proceed with a matter in which it has no jurisdiction. Once the court suspects it has no jurisdiction, it must address the issue forthwith.

23. The parties before me agree that jurisdiction is what allows a court to hear and determine a matter before it. If any authority is required on that point then "**Lillian S**" succinctly speaks to the issue of jurisdiction as follows:-

**"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 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."**

24. In **Samuel Kamau Macharia** (supra) the Supreme Court addressed the issue of jurisdiction as follows:-

**"(68) 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 counsel 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. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011.* Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

25. There appears to be contradictory positions held by various judges of the High Court and the E&LC as regards the jurisdiction of the High Court vis-à-vis that of the E&LC in respect of enforcement of rights and fundamental freedoms in matters reserved for the E&LC by the Constitution. I will proceed to highlight some of the cited cases.

26. In **Ledidi Ole Tauta** (supra) a panel of three Judges faced with a challenge to their jurisdiction held that:-

**“Having regard to the Constitutional provision under Article 165(3)(b) and section 13(3) of the Environment and Land Court [Act] it is our view that in Constitutional matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms in as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and in our view a party can bring such matters either before the High Court and/or before this court.”**

27. A bench of five Judges reiterated that position in **Patrick Musimba** (supra) when they held that:-

**“65. The above analysis lead us to the conclusion that both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limit the High Court’s jurisdiction in this respects while a closer reading of the ELC Act reveals that the ELC Court’s jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned but the Court of Appeal in *Mugendi* expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We hold that in matters constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land....**

**68. We are satisfied that although the jurisdiction in constitutional matters conferred by Section 13(3) of the ELC Act upon the ELC appears limited to questions on and application for redress of a denial violation or infringement or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42,69 and 70 of the Constitution, the section did not purport to confer exclusive jurisdiction in such cases upon the ELC so as to impinge upon the provisions of Article 165(3)(b) & (d) of the Constitution. We are also satisfied that it could not have been the intendment of the draftsmen of the Constitution that when the court is faced with a mixture of causes of action touching on the Constitution, especially on fundamental rights, a separationistic approach is to be adopted by the court and half the claim dispatched to one court as the other half is retained.”**

28. In **Leisure Lodges Ltd** (supra) three judges addressed the issue of jurisdiction as follows:-

**“41. We think that this territory and question has been adequately and exhaustively traversed in the decision of the court in *Patrick Musimba vs. National Land Commission* (supra), and we associate ourselves with the reasoning therein, and agree with the conclusions and determination therein in relation to the issue of jurisdiction of the High Court, and courts of the status of the High Court, in determination of issues Constitution, and the right of the Chief Justice to empanel Judge or Judges under Article 165(4), and we endorse the determination thereof.**

**42. Finally, whereas we recognize the duality or concurrent and coordinate jurisdiction of the High Court and Environment and Land Court, we are also keenly aware of the need to have the Petition expeditiously disposed of, and it would be more appropriate to determine the Petition before this court. The public interest as expressed in Article 159 of the Constitution demands that justice shall not be delayed and shall be administered without undue regard to procedural technicalities.”**

29. The other view on the question of jurisdiction was expressed by Munyao Sila, J in **Mohamed Said** (supra) thus:-

**“Indeed, the High Court has no jurisdiction in respect of matters that fall within the jurisdiction of the Environment and Land Court or that falling within the jurisdiction of the Industrial Court....**

**As correctly pointed out in the *Omar Tahir Said v Registrar of Titles* case, the High Court has no jurisdiction to hear petitions touching on environment and land. These are to be heard and determined by the Environment and Land Court. The same goes to jurisdiction touching on “employment and labour relations.” The High Court has no jurisdiction to hear and determine such disputes even when they are filed as constitutional petitions.”**

30. In **Fredrick Kivuti** (supra), F. Muchemi, J held that:-

**“27. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. See the case of *Samuel Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011. At this point, I wish to clearly state that the jurisdiction of the Environment and Land Court is only limited to the disputes contemplated under Article 162(2)(b) of the Constitution and Section 13 of the Act. In this regard, my view is that the intention in the Constitution is that if an issue arises touching on land in respect of its use, possession and control, then this High Court will have no jurisdiction. If the dispute touching on land is for anything else other than which I have stated, my view is that, that dispute will be outside the jurisdiction of the Land Court. The same was upheld by Mabeja, J in *Capital Fish Kenya Limited vs. Monnatz Limited & 2 others* (2014) eKLR.”**

31. In **Kenya Urban Roads Authority v Ministry for Roads & another** [2017] eKLR, E. K. O. Ogola, J held that:-

“30. It is evident that the Environment and Land Court being a court with the status of the High Court as the Employment and Labour Relations court is, has the jurisdiction to deal with issues relating to denial, violation or infringement of, or threat to, rights and fundamental freedoms in matters envisioned by Article 162(2)(b) and Section 13 of the Environment and Land Court Act. Thus, the issues raised and remedies sought in the Petition and subsequent cross-petition herein can be dealt with by the Environment and Land Court.”

32. Mativo, J held in **Republic v Chief Land Registrar & another** [2019] eKLR that:-

“14. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act.<sup>[14]</sup> In this regard, my view is that the intention of the Constitution is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction. My strong view is that this suit ought to have been transferred to the proper court the moment the Constitution of Kenya 2010 divested this court the jurisdiction to hear the case. Buttressed by the provisions of the Constitution and section 13 of the Environment and Land Court Act, <sup>[15]</sup> I am clear in my mind that this court cannot properly entertain the application before me.

15. It is beyond argument that a High Court may not determine matters falling squarely under the jurisdiction of the Employment and Labour Relations Court and the Land and Environment Court, whether it is a substantive hearing or an application such as the instant application.

16. Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of the application before me. A boundary dispute or enforcing an order relating to a boundary dispute falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of the Constitution were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status.

17. Where the constitution and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction is inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under the Constitution. On this ground, I dismiss the Application dated 26<sup>th</sup> February 2018.”

33. The Petitioner's counsel contends that the E&LC has no jurisdiction to touch matters of enforcement of rights and fundamental freedoms. Although he concedes that Section 13(3) of the E&LC Act expressly confers jurisdiction on the E&LC to handle such issues, he urges that the jurisdiction is limited to Articles 42, 67 and 70 of the Constitution. He asserts that the petition before this Court touches on other Articles of the Constitution. These arguments, I must state, were long put asunder by the Court of Appeal in **Daniel N. Mugendi v Kenyatta University & 3 others** [2013] eKLR where it was held that:-

“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”

34. Even assuming, but there is no basis for such assumption, that

the instant petition is a “mixed grill” matter, I would find that dominant issue is title to land. The dominant issue in the petition belongs to the E&LC as it concerns “*the environment and the use and occupation of, and title to, land.*” It is my view that any constitutional issues in the petition arise in that context and those issues are better addressed by the E&LC. In **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others** [2017] eKLR, the Court of Appeal enunciated the ‘*principle of the dominant issue*’ by stating that:-

“41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. In **Paramount Bank Limited vs. Vaqvi Syed Qamara & another** [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“*The origin of the dispute between the 1<sup>st</sup> respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1<sup>st</sup> respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately.*”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.”

35. The power of the Employment and Labour Relations Court, a Court similar to E&LC, to uphold and enforce the Bill of Rights was confirmed by Okwengu, JA in **Judicial Service Commission v Gladys Boss Shollei & another** [2014] eKLR when she stated that:-

“[40] *Article 23(1) & Article 165(3)(b)* of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, *Article 23(2)* provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, *Article 23(3)* does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers “a court” to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is *Article 20(3)* that places an obligation on “any court” in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts.

[41] Under *Article 162(2)(a)*, the Constitution has provided for special Courts with the “status” of the High Court to determine employment and labour relations disputes. The fact that the Industrial Court has been given the “status” of the High Court enhances the power and discretion of the Court in granting relief. In my considered view, the general power provided to the Industrial Court under *Section 12(3)(viii)* of the Industrial Court Act to grant relief as may be appropriate, read together with *Article 23(3)*, empowers the Industrial Court to grant the kind of reliefs that the respondent sought in her petition....

[42] In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship would defeat the intention and spirit of the Constitution in establishing special courts to deal with employment and labour disputes. Indeed such a stance would not only be inimical to justice, but would expressly contravene *Article 20* of the Constitution that provides that the Bill of Rights “applies to all law and binds all state organs and persons”, and enjoins a court to promote the spirit, purport and objects of the Bill of rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom.”

36. Counsel for the Petitioner cited **Musk Deer Limited** (supra) as holding that the High Court has jurisdiction to hear any matters relating to violation of constitutional rights emanating from land matters. This is what the Court of Appeal said:-

“[17] On the overall issues of jurisdiction, it is clear by dint of *Article 22(1)* of the Constitution, every person has the right to institute court proceedings claiming that a right or freedom guaranteed in the Bill of Rights has been denied, violated, infringed or threatened. As a corollary, *Article 23(1)* confers on the High Court jurisdiction to hear and determine applications where a party alleges denial, violation, infringement, or threat to a right or freedom guaranteed by the Bill of Rights....

The 1<sup>st</sup> respondent approached the High Court because he had a mixed bag of issues that touched on fair hearing, the principles of fair administrative action, abuse of the court process and finally a declaration that he was deprived proprietary and possessory rights of his property arbitrarily. To us the germane issue that cuts across the entire spectrum of the petition was the allegation of breach of fundamental rights to a hearing and therefore to say the matter should have been filed before the ELC is like splitting of hairs. Supposing the 1<sup>st</sup> respondent did so and he was met with another objection that ELC had no jurisdiction to rule over such matters as fair hearing, lack of service and denial of information. This is what we would term a procedural technicality because the 1<sup>st</sup> respondent was predominantly challenging a court order issued *ex parte* and a null and void sale that resulted in the vesting of his property by a subordinate court that had no jurisdiction and the ultimate loss of his property. This ground of appeal therefore is without merit.”

37. In my view, the decision of the Court of Appeal was in the genre of the decision in **Patrick Kangethe Njuguna** (supra). It was determined that the dominant issue fell within the jurisdiction of the High Court. Indeed the Court of Appeal in **Musk Deer Limited** (supra) observed that the germane issue was the allegation of breach of the right to a hearing.

38. Counsel for the Petitioner also placed reliance on the holding of the Supreme Court in **Republic v Karisa Chengo & 2 others** [2017] eKLR that:-

“[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).*”

39. The interpretation of the Petitioner’s counsel of the Supreme Court decision is that the jurisdiction expressly donated to the High Court cannot be transposed to the E&LC. That is indeed a correct statement. However, it must be remembered that the dispute in that case revolved around the exercise of criminal jurisdiction by the E&LC and the Employment and Labour Relations Court. I do not see any statement in the judgement of the Supreme Court that the High Court can now cross over and handle matters of the specialized courts.

40. I actually find merit and associate myself with the holding in the case of **Delmonte Kenya Limited v County Government of Murang’a & another** [2019] eKLR that:-

**“89. In the end we find and hold that the dominant issue in the petition is the right to renewal of leases over the suit land. We further find that the issue is intrinsically connected to the use and title to land. The dispute thus falls squarely within the purview of the ELC under Article 162(2) of the Constitution as read with Section 13 of the ELC Act. We also find that although the petitioner claims violation of various constitutional rights, those claims are intertwined with the dominant issue and that the ELC has jurisdiction to deal with the alleged violations.”**

41. The position in the cited case is the exact position in the case before me. The Petitioner’s main issue is the alleged alienation of his title and land by the 2<sup>nd</sup> Respondent. The alleged violation of constitutional rights through the actions of the 2<sup>nd</sup> Respondent will be dealt with by the E&LC. I therefore find and hold that this court lacks jurisdiction to entertain the Petitioner’s case.

42. At this juncture, I should, as I normally do direct that the matter be transferred to the E&LC for hearing and determination. I normally put reliance on **Daniel N. Mugendi** (supra). The 2<sup>nd</sup> Respondent has, however, submitted that based on the decision of the Court of Appeal in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR**, a court without jurisdiction has no power to transfer a case to a court with jurisdiction. In the stated case, the Court of Appeal held that:-

**“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”**

43. In retrospect, I now realize that transfer in the **Daniel N. Mugendi** case was based on the reasons that:-

**“Believing as we do that the approach taken by *Majanja J* is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to *Article 165(5)(b)*. And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.”**

44. It seems the transfer of matters between courts was a temporary measure to take care of the changes introduced by the Constitution, 2010 and to allow parties to familiarize themselves with the new litigation terrain. I do not think that ten years after the promulgation of the current Constitution, a litigant can still be allowed to majestically march to the wrong court and expect that the court without jurisdiction will transfer the matter to the court with jurisdiction. The **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel** case which was decided by the Court of Appeal after its decision in the **Daniel N. Mugendi** case is the decision that should guide this Court on what to do.

45. Having determined that I have no jurisdiction to entertain this petition, the only available remedy is to strike it out. It is thus struck out with costs to the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.

**Dated, signed and delivered through video conferencing/email at Nairobi this 14<sup>th</sup> day of May, 2020.**

**W. Korir,**

**Judge of the High Court**