



REPUBLIC OF KENYA



**Ngugi v Attorney General & 5 others (Constitutional Petition
E005 of 2022) [2025] KEHC 13947 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E005 OF 2022**

**JM OMIDO, J
SEPTEMBER 25, 2025**

BETWEEN

STEPHEN CHEGE NGUGI PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY 2ND RESPONDENT

**CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL
PLANNING 3RD RESPONDENT**

**CABINET SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS ... 4TH RESPONDENT**

CHIEF LAND REGISTRAR 5TH RESPONDENT

NATIONAL LAND COMMISSION 6TH RESPONDENT

RULING

A. Background

1. The Petitioner herein Stephen Chege Ngugi filed the petition dated 3rd February, 2022 in which he claimed that he was the registered absolute proprietor of the parcels of land registered and known as Title Numbers Kisumu/Kogony/471; Kisumu/Kogony/472; Kisumu/Kogony/473; Kisumu/Kogony/474; Kisumu/Kogony/475; Kisumu/Kogony/476; Kisumu/Kogony/477; Kisumu/Kogony/478; Kisumu/Kogony/479; and Kisumu/Kogony/480, all located near the Kisumu International Airport (hereinafter “KIA”).
2. The Petitioner pleaded that on or about the year 2010, the 2nd Respondent – Kenya Airports Authority – expressed the desire to acquire the aforementioned parcels of land for the purposes of the expansion



and upgrading of KIA, whereupon a series of valuations of the land and the trees that were thereon were conducted independently by the two parties.

3. The petitioner pleaded further that an agreement was reached that he would be compensated for the land and the trees upon the 2nd Respondent taking possession of the properties. The 2nd Respondent took possession of the parcels of land but failed to honour its part of the bargain as it did not compensate the Petitioner for the same, necessitating the instant petition.
4. The Petitioner further pleaded that he was never served with any notice of compulsory acquisition of the properties and that no gazette notice for the same was issued.
5. In his petition, the Petitioner sought against the Respondents the following reliefs:
 - a. It be declared that the Respondents have contravened the Petitioner's right to property under Article 40(1) and (3) of the Constitution and therefore that the acquisition of his parcels of land namely Kisumu/Kogony/471; Kisumu/Kogony/472; Kisumu/Kogony/473; Kisumu/Kogony/474; Kisumu/Kogony/475; Kisumu/Kogony/476; Kisumu/Kogony/477; Kisumu/Kogony/478; Kisumu/Kogony/479; and Kisumu/Kogony/480 was unconstitutional and illegal.
 - b. It be declared that the Respondents have committed trespass to the Petitioner's land.
 - c. A declaration that the Petitioner is entitled to payment of damages and compensation for the violations and contravention of their (sic) fundamental rights under the aforementioned provisions of the Constitution.
 - d. The Petitioners (sic) to be paid full and just compensation of market rates for the acquisition of the properties known as Kisumu/Kogony/471; Kisumu/Kogony/472; Kisumu/Kogony/473; Kisumu/Kogony/474; Kisumu/Kogony/475; Kisumu/Kogony/476; Kisumu/Kogony/477; Kisumu/Kogony/478; Kisumu/Kogony/479; and Kisumu/Kogony/480.
 - e. General, aggravated, exemplary and special damages for unlawful encroachment upon the Petitioner's land.
 - f. Compensation for the entire acreage of the Petitioner's parcels of land id est; Kisumu/Kogony/471 (0.18Ha); Kisumu/Kogony/472 (0.08Ha); Kisumu/Kogony/473 (0.13Ha); Kisumu/Kogony/474 (1.16Ha); Kisumu/Kogony/475 (1.12Ha); Kisumu/Kogony/476 (1.3Ha); Kisumu/Kogony/477 (0.11Ha); Kisumu/Kogony/478 (0.87Ha); Kisumu/Kogony/479 (0.14Ha); and Kisumu/Kogony/480 (0.27Ha).
 - g. Loss of user.
 - h. Interest and costs.
 - i. Any other relief the court may deem just and equitable.

B. The Preliminary Objection Dated 24th March, 2022.

6. The 1st to 5th Respondents resisted the Petition by filing a notice of preliminary objection dated 24th March, 2022 seeking to have the petition struck out in its entirety on the ground that:
 1. By dint of Article 165(5)(b) of the Constitution, the High Court is specifically barred from dealing with matters falling within the jurisdiction of the Environment and Land Court.



C. The Notice of Motion Dated 26th May, 2022

7. Prompted, perhaps, by the preliminary objection, the Petitioner filed an application by motion on notice dated 26th May, 2022, in which he sought the following orders:
 - a. [Spent].
 - b. That this suit be transferred to and be adjudicated by the Environment and Land Court, Kisumu.
 - c. That the costs of the application be provided.
8. In precis, the grounds upon which the application is premised are that although the petition is a composite of myriad causes of action (which the Petitioner refers to as “a mixed grill”) with the result that its nature vests jurisdiction in two or more courts (in this case the High Court and the Environment and Land Court), it dominantly is one that relates to the issue of title, use, occupation and disposal of land associated with contravention of fundamental rights enshrined in the Constitution.
9. I will say more on the application later on in this ruling.

D. Directions on the Preliminary Objection.

10. On 4th June, 2024, this court (Shariff J.) issued directions that the preliminary objection be canvassed by way of written submissions. The parties filed their respective submissions, with all the Respondents supporting it while the Petitioner resisted it.

E. Submissions in Support of the Preliminary Objection.

11. The 1st to the 5th Respondents submitted that under Article 165(5)(b) of the Constitution, the High Court is expressly prohibited and/or barred from dealing with matters which are specifically within the exclusive jurisdiction of the Environment and Land Court (“ELC”) and the Employment and Labour Relations Court (“ELRC”).
12. The proponents of the preliminary objection relied on the authority of *Karisa Chengo & 2 others v Republic* [2015] eKLR where the Court of Appeal held as follows:

“The jurisdiction of the High Court is limited; it cannot exercise jurisdiction on matters falling within the jurisdiction of the two courts contemplated in Article 162(2). Therefore, the High Court no longer has original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under Section 12 of the ELRC and Section 1 of the ELC Act. Conversely, the ELRC and ELC cannot deal with matters reserved for the High Court.”
13. The 1st to 5th Respondents further sought to rely on the authority of *Mohamed Ali Baadi & others v Attorney General & 11 others* [2018] eKLR, where the court observed that:

“...The Supreme Court in *Republic v Karisa Chengo & 2 others* amplified and pertinently held that each of the superior courts established by or under the Constitution has jurisdiction only over matters exclusively reserved to it by the Constitution or by a statute as permitted by the Constitution. The holding in this case however, does not resolve the knotted question of which court among the High Court and the two equal status courts under Article 162(2)(b) should be seized of jurisdiction in controversies in hybrid cases. Hybrid cases are cases where



issues cut across the exclusive jurisdiction cut for each of the three courts. As demonstrated by the issues identified above, this is one hybrid case.”

14. In conclusion, the 1st to 5th Respondents proffered the position that the petition herein presents matters that are exclusively under the province of the ELC and that this court therefore lacks the requisite jurisdiction to hear and determine the petition. The five Respondents invited the court to consider and follow the dicta in the Supreme Court case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the court held that a court’s jurisdiction flows from either the Constitution, legislation or both and that a court can only exercise jurisdiction as conferred by the Constitution or written law and cannot arrogate itself jurisdiction that exceeds that conferred upon it by law.
15. In support of the preliminary objection, the 6th Respondent urged in its submissions that the subject matter of the petition falls wholly within the exclusive jurisdiction of the ELC. Placing reliance on the case of Samuel Kamau Macharia (supra), the 6th Respondent stated that this court does not have the requisite jurisdiction to entertain and determine the petition as Article 165(5)(b) of the Constitution explicitly bars it from hearing and determining matters specifically reserved for the ELC and the ELRC.
16. The 6th Respondent further submitted that Section 13(2) of the Environment and Land Court Act grants the ELC jurisdiction over disputes relating to the administration and management of land; public, private and community land rights; compulsory acquisition and resettlement and land related constitutional petitions.
17. To that end, the 6th Respondent relied on the authority of Republic v Chief Land Registrar & Another [2019] eKLR, in which the court held as follows:

“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. 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, I am clear in my mind that this court cannot properly entertain the application before me.”

18. The 6th Respondent further placed reliance on the case of Attorney General & 2 others v Okiya Omtata Okioti & 14 others [2020] KECA 30 (KLR) where the Court of Appeal held that:

“We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in United States International University (USIU) v. The Attorney General & Others [2012] eKLR and this Court in Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR.

However, the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters.



In Daniel Maingi Muchiri Jubilee Insurance Co Ltd, CA No 138 of 2016, this Court expressed the position as follows:

“The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction.” (Emphasis added).”

19. The last decision that the 6th Respondent relied on was that of Karisa Chengo (*supra*) whereby this court was invited to consider the following text:

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

.....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.”

20. In conclusion, the 6th Respondent submitted urged this court to reach the determination that it lacks jurisdiction under Article 165(5)(b) of the *Constitution* and Section 13(2) of the *Environment and Land Court Act* to determine the petition herein and sought an order that the petition be transferred to the ELC.

F. Submissions in Opposition to the Preliminary Objection.

21. It is instructive from both the physical record and the CTS that the Petitioner did not file any submissions on the preliminary objection.

G. Issues, Analysis & Findings

22. A preliminary was in the case of Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 defined as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. It raises a pure point of law, which, if argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”

23. It is therefore imperative that in determining the issues raised in the preliminary objection, I must not go beyond what the law provides and what the petitioner has pleaded in the petition. I have looked at the objection and I am satisfied that the same meets the definition in Mukisa Biscuits as this court, in resolving the objection, will not require investigating facts (e.g., via evidence), or deal with any matter involving judicial discretion.
24. Having considered the preliminary objection, the submissions thereon and the record in its entirety, I discern the issues that I am now tasked to address and determine to be the following:
- a. Whether this court has jurisdiction to hear and determine the petition filed herein.



- b. Subject to (a) above, what fate should follow the petition.
- c. A determination as to costs.
25. I will proceed to deal with the issues set out above seriatim.
26. The first issue for me to determine is whether this court has jurisdiction to hear and determine the petition filed herein. On this, we have seen from the decisions of Karisa Chengo (supra), Okiya Omtata Okoiti (supra) and Mohamed Ali Baadi (supra) that under Article 165(5)(2)(b) of the *Constitution*, the High Court does not have jurisdiction to entertain and determine matters that are demarcated to be within the exclusive reserve of the ELC and the ELRC.
27. We have also seen from the decision of Republic v Chief Land Registrar (supra) that the ELC has the exclusive jurisdiction to determine constitutional petitions limited to the disputes contemplated under Article 162(2)(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*.
28. What then this court should address is whether the matters that the petition herein presents are disputes purely under the two provisions or whether there are other disputes presented by the petition that would fall within the jurisdiction of the High Court.
29. In other words, does the petition present disputes other than those that touch on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land? If the answer is in the negative, then the definite answer to the first issue is that the High Court is not clothed with jurisdiction to determine the petition. If the answer is in the affirmative and the court is of the opinion that the issues cut across those that are to be handled by the High Court and others by the ELC, then this court will look to the dominant purpose doctrine to determine which court is best suited to handle the petition.
30. In this context the dominant purpose doctrine is applied to determine which court – among the High Court, the ELC or the ELRC – has jurisdiction when a case involves overlapping issues. If a dispute contains elements that could fall under more than one court’s mandate, the court will examine the dominant or primary purpose of the claim to decide the appropriate forum. For instance, if a case involves an employment dispute where land is merely incidental (e.g., staff housing), the ELRC would have jurisdiction because the dominant issue is employment. Conversely, if land ownership or use is central and employment issues are secondary, the ELC would take precedence.
31. As dictated by the case of Mukisa Biscuits, I have carefully examined the petition herein and one will note that the Petitioner’s claim is purely based on the alleged takeover and subsequent occupation of his 10 parcels of land by the 2nd Respondent.
32. All the reliefs sought in the petition (which I have reproduced above) are in respect of use, possession, control, title, compulsory acquisition of land, which all fall under the exclusive jurisdiction of the ELC. The petition does not present any other issue that would fall outside the jurisdiction of the ELC. Thus then, following the dicta set out in the authorities referred to above, this court does not, under Article 165(5)(2)(b) of the *Constitution* have jurisdiction to entertain and/or determine the instant petition.
33. That then brings us to the second issue, which is the fate that then befalls the petition. As I address this issue, I will contemporaneously speak to the position of the application dated 26th May, 2022 that seeks an order to transfer this petition to the ELC.
34. Having found that this court lacks jurisdiction to entertain and determine the petition, this court, as held in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR cannot take any further substantive proceedings, including making an order for the transfer of the petition to the ELC.



35. Nyarangi JA, in Motor Vessel “Lillian S”, addressed the position that should follow when a court reaches the finding that it is without jurisdiction. In his canonical words, he held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

36. Courts have embraced the view that once a court reaches a finding that a suit was filed before a court that is without jurisdiction, that court cannot transfer the suit to a court that would have jurisdiction because transfer of a suit is a substantive order which can only be made by a court that is clothed with jurisdiction. A suit that is filed in a court that does not have jurisdiction to hear and determine it is therefore non-starter and null ab initio.

37. The Court of Appeal Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, held as follows on the issue:

“According to the appellant, the court had no jurisdiction and the suit was a nullity ab initio and it could not therefore be transferred to the High Court whether by consent or otherwise. On the other hand, the respondent seems to be saying that the subordinate court had jurisdiction to hear the suit but only award damages that were within its pecuniary jurisdiction, and therefore the suit was transferable to the High Court.

We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.”

38. In Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR, the court addressed the issue in the following words:

“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 S.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 a 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 same.... In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)”

39. The foregoing then means that the order for the transfer of the suit as sought in the notice of motion dated 26th May, 2022 is one that cannot be available as this court has no jurisdiction to grant the same.



40. Being of the foregoing findings, I reach the result that this court lacks jurisdiction to entertain and determine the instant petition under Article 165(5)(2)(b) of the Constitution. Consequently, I proceed to strike out the petition in its entirety.
41. On costs, the default rule under Section 27 of the Civil Procedure Act is that the successful parties, in this case the Respondents, are entitled to costs. The Petitioner will therefore bear the Respondents' costs of the petition.
42. This file is hereby closed.

DELIVERED (VIRTUALLY) DATED & SIGNED THIS 25TH DAY OF SEPTEMBER, 2025.

JOE M. OMIDO

JUDGE

For The Petitioner: No Appearance.

For The 1st, 3rd, 4th & 5th Respondents: No Appearance.

For The 2nd Respondent: Ms. Wachanga.

For The 6th Respondent: No Appearance.

