



REPUBLIC OF KENYA



**Africa Telecom Solutions Limited v Kiwaka General Merchants Limited & another (Commercial Case 694 of 2012) [2025] KEHC 15092 (KLR) (Commercial and Tax) (21 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15092 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 694 OF 2012  
JWW MONG'ARE, J  
OCTOBER 21, 2025**

**BETWEEN**

**AFRICA TELECOM SOLUTIONS LIMITED ..... PLAINTIFF**

**AND**

**KIWAKA GENERAL MERCHANTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction and Background**

1. Before the Court for determination is Notice of Preliminary Objection dated 30<sup>th</sup> September 2024 (“the Objection”) on the ground that this Court lacks jurisdiction to hear and determine this case and that the subject matter of the suit, including the Plaintiff’s Complaint and the Defendants’ own Counterclaim, falls under the jurisdiction of the Environment and Land Court (ELC). The Objection has been canvassed by way of written submissions which are on record and I have considered the same in my analysis and determination below.

**Analysis And Determination**

2. The locus classica case on Preliminary Objections is that of the predecessor of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696 and the decision has since been affirmed by the Supreme Court in *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR)]. In *Mukisa*(supra) Law J.A., and *Newbold P.* respectively at 700 and 701, held as follows:



Law, JA.:

“So far as I am aware, a Preliminary Objection consists of a pure 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. Examples are an objection on the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

3. In summary, for one to succeed in putting up a Preliminary Objection, the facts pleaded by the other party are assumed to be correct; it must be a matter of law which is capable of disposing off the suit; it must not be blurred by factual details calling for evidence; it must not call upon the Court to exercise discretion. The Objection challenges inter alia the jurisdiction of this Court. An objection to the jurisdiction of the Court has been cited as one of the preliminary objections that consists a point of law.
4. Nyarangi JA., in *The Owners of Motor vessel Lillian ‘S’ v Caltex Kenya Limited* [1989] KECA 48 (KLR)] laid emphasis on the issue of jurisdiction. The Court stated thus ‘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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’ It is therefore my finding that the Defendants’ challenge on the jurisdiction of this Court is a point of law that can be brought by way of a preliminary objection.
5. The Defendants contend that the Plaintiff’s original Plaintiff dated 29<sup>th</sup> October 2012 seeks main prayers for a permanent injunction restraining the Defendants from dealing with or interfering with the property known as Land Reference Number 1/1151 (Original Number 1/58/2/7), interfering with the Plaintiff’s quiet possession and/or occupation of the same property and as such, they contend that the Court is effectively being asked to determine the rightful owner of the suit property.
6. The Defendants submit that the dispute involves the ownership and use of land, which falls under the exclusive jurisdiction of the ELC, as mandated by Article 162(2)(b) of *the Constitution* and Section 13(1) and (2) of the *Environment and Land Court Act* (Chapter 8D of the Laws of Kenya) (“the ELC Act”). The Defendants also submit that the suit cannot be cured by transfer to the ELC citing the Court of Appeal’s decision in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] KECA 767 (KLR) and they submit that jurisdiction is primordial; a suit filed without jurisdiction is “dead on arrival” and cannot be remedied or sanctified through transfer.
7. On its part, the Plaintiff acknowledges the suit seeks a permanent injunction over Land Reference Number 1/1151, however, they argue that the nature of the dispute may still fall under the High Court’s civil jurisdiction as per the Court of Appeal decision in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] KECA 79 (KLR). In this case, it was held that the ELC’s jurisdiction on contracts related to land is limited to disputes connected to the ‘use’ of land and that



ELC's land-related contract jurisdiction does not include mortgages, charges, collection of dues, and rents, which are matters falling within the civil jurisdiction of the High Court.

8. The Plaintiff also submits that the Objection constitutes bad faith and malice due to inordinate delay, violating Article 159(2)(d) of *the Constitution*. That the suit was commenced in October 2012, and the Objection was raised approximately 12 years later and the Defendants have actively participated in the proceedings for years, including filing a Defence and Counterclaim, an interlocutory application, and an unsuccessful appeal at the Court of Appeal. The Plaintiff cites the Owners of The Motor Vessel "Lillian S" case (*supra*), emphasizing that a preliminary objection on jurisdiction should be raised at the earliest opportunity and that it would be unjust to strike out the suit after such a long period. That should the Court find that it indeed lacks jurisdiction, the Plaintiff submits that striking out the suit is a draconian measure that should be avoided and the only appealing remedy available is to transfer the suit to the ELC, which has competent jurisdiction, rather than dismissing it. The Plaintiffs submit that the Defendants have not demonstrated any prejudice they would suffer from a transfer.
9. Going through the parties' submissions, even though the Plaintiff states that the Defendants have taken quite a long time to raise the issue of jurisdiction, it is trite that a preliminary objection can be raised at any time given that it goes to the jurisdiction of the Court (see *Muriuki v Kointakei & 2 others* [2025] KEELC 5783 (KLR)). Indeed, the Supreme Court, in *Dina Management Ltd v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) held that the issue of jurisdiction can be raised at any stage of the proceedings in any Court including at the appellate stage even though it was never raised at trial. It is therefore my finding that it is not fatal nor is it inordinate for the Defendants to raise a jurisdictional objection at this time and stage.
10. On whether the Court or the ELC has jurisdiction to hear and determine this matter, it is common ground that the ELC which is a specialized Court established under Article 162(3) of *the Constitution* and the ELC Act to hear and determine disputes relating to the environment and the use and occupation of and title to land. Under the ELC Act, the jurisdiction of the ELC is set out in section 13 as follows:

13. Jurisdiction of the Court

- (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 interest in land; and
  - (e) any other dispute relating to environment and land.



11. The Supreme Court in *Republic v Chengo & 2 others* [2017] KESC 15 (KLR) emphasized the High Court, the ELC and Employment and Labour Relations Court are three different and autonomous Courts which exercise different and distinct jurisdictions. Further, that Article 165(5) of *the Constitution* precludes the High Court from entertaining any matters that fall within the jurisdiction of the other two equal status Courts. The answer to the Objection raised by the Defendants on jurisdiction depends the nature of the cause of action as set out in the Plaintiff's Plea. I have gone through the same and I am inclined to agree with the Defendants that the Plaintiff largely seeks orders touching on the use of the property Land Reference Number 1/1151, which falls within the contemplation under section 13 of the ELC Act above. I am therefore satisfied that this suit will best be determined by the ELC, which is competent to hear and determine issues of land use.
12. In respect of the Plaintiff's prayer that this matter be transferred to the ELC rather the same being struck out, I will borrow the reasoning of Mwamuye J in *Law Society of Kenya v National Environmental Management Authority (NEMA) & 4 others* [2025] KEHC 13482 (KLR) when faced with the same plea:
  28. With respect to the Petitioner's plea that the matter be transferred rather than struck out, it is imperative to underscore that jurisdiction is not a mere procedural formality but a substantive and foundational legal requirement. A Court devoid of jurisdiction is bereft of any legal authority to entertain, consider, or make orders in the matter including an order of transfer. While the Court of Appeal in *Daniel N. Mugendi v. Kenyatta University & 3 Others* [2013] eKLR appeared to endorse a pragmatic approach that would permit transfer of proceedings to the appropriate specialized Court where a matter had been filed in the wrong forum, this position has since been overtaken by subsequent and binding jurisprudence. In particular, the Supreme Court's decision in *Republic v. Karisa Chengo & 2 Others* [2017] eKLR reaffirmed the strict jurisdictional boundaries between the High Court and Courts of equal status established under Article 162(2) of *the Constitution*, thereby casting significant doubt on the viability of transfer in cases commenced in a Court lacking jurisdiction.
  29. Subsequent decisions of the High Court have aligned with this position, holding that where a matter is nullity ab initio for want of jurisdiction, the proper and lawful course is to strike it out. In *Owalla v. Siaya County Assembly & Others* (Siaya Petition E002 of 2022), the Court emphasized that the High Court cannot purport to exercise jurisdiction conferred exclusively on another Court of equal status. The Court therein struck out a petition improperly brought before it, observing that jurisdiction is a matter of constitutional design and must be respected to preserve the institutional integrity of specialized Courts.
  30. In the present matter, the dispute falls squarely within the constitutional and statutory remit of the Environment and Land Court. The involvement of environmental authorities, the reliefs sought, and the nature of the alleged violations all point to a matter that Article 162(2) (b) reserves to the ELC. This Court, by virtue of Article 165(5)(b), lacks the jurisdiction to entertain the Petition. Jurisdiction is conferred by law and cannot be assumed, inferred, or expanded through party consent or creative pleadings. As was stated in *Lilian S*, a Court must act only within the limits of jurisdiction conferred upon it. Any orders made without jurisdiction are null and void.
  31. Accordingly, I find that the 5th Respondent's Preliminary Objection is meritorious. The Court, having found that the Petitions were instituted before a forum devoid of jurisdiction, holds that they are incapable of being sustained.



32. Consequently, and for the reasons set out above, this Court finds and concludes that it lacks the requisite jurisdiction to hear and determine Petition No. E257 of 2025 and Petition No. E231 of 2025 as filed by the Respondent/Petitioner.

Orders

- a. The Petitions filed on 7th May 2025 and 30th April 2025 are struck out in its entirety for want of jurisdiction.
  - b. Each party shall bear its own costs of the proceedings on the Preliminary Objection and the Petition.
13. I align myself with the aforementioned findings and the binding decision of the Court of Appeal in Phoenix of E.A. Assurance Company Limited(supra) that once it is determined that the Court lacks jurisdiction to hear a matter, the ordinary and legal course thereafter is to strike out the matter. There is no legal room for ordering a transfer to the appropriate Court.

**Conclusion And Disposition**

14. In the foregoing, I allow the Defendants' Preliminary Objection dated 30<sup>th</sup> September 2024 and now strike out the Plaint dated 21<sup>st</sup> October 2012 and the suit in its entirety for want of jurisdiction. On costs, I note that due to the period it has taken for the Objection to jurisdiction to be filed, it would be not appropriate to condemn the Plaintiff to costs seeing that the court has struck off the suit. I direct that each party bear their own costs of the Objection and the suit. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER 2025**

.....  
**J.W.W. MONGARE**

**JUDGE**

In The Presence Of

N/A for the Plaintiff.

Mr. Omulanya holding brief Mr. Makau for the Defendant.

Amos- Court Assistant

