

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELCLC NO. E161 OF 2025

CECILY WANGARI KARIUKI
PLAINTIFF

VERSUS

DENNIS MITHAMO KARIUKI 1ST
DEFENDANT

ANNE MUMBI KARIUKI 2ND
DEFENDANT

CYKA MANPOWER SERVICES LIMITED 3RD
DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED 4TH
DEFENDANT

EQUITY BANK(KENYA)LIMITED 5TH
DEFENDANT

RULING

Background

1. Before this court for determination are the 1st-3rd and 4th and 5th Defendants' Notices of Preliminary Objection dated 7th May, 2025 and 19th June, 2025 respectively.
2. Vide the Preliminary Objection dated 7th May, 2025, the 1st - 3rd Defendants contend that:

i. The court has no jurisdiction to hear and determine commercial matters.

ii. That the suit is incompetent, bad in law, an abuse of the Court process and ought to be struck out with costs.

3. In respect to the Preliminary Objection dated 19th June, 2025, the 4th and 5th Defendants have averred that this Honourable Court lacks the jurisdiction to entertain the application and the entire suit as the nature of the dispute relates to the registration and enforcement of legal charges, debentures and matters of company law which are within the exclusively jurisdiction of the High Court.
4. The objections were canvassed by way of written submissions.

Submissions

5. The 1st- 3rd Defendants filed submissions on 11th July, 2025. Counsel submitted that **Section 13** of the **Environment and Land Act** clothes this court with jurisdiction to hear and determine matters relating to land and use of land. The issues herein, it was averred, relate to a charge secured by the 3rd Defendant and has nothing to do with the use of the suit property, guided by the decision of the Court of Appeal in **Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others [2017]eKLR**
6. Counsel submitted that besides the challenge on the validity of the charge created on 12th April 2019 and the debentures

registered, the Plaintiff has sought, *inter alia*, for declarations to challenge her removal as a director of the 3rd Defendant, her removal as an administrator of the estate of the late Cyrus Kariuki Waithaka and further sought for production of rent income statements and that by virtue of **Section 3** of the **Companies Act**, this court similarly lacks the jurisdiction to entertain these issues.

7. The 4th and 5th Defendants filed submissions on 19th June, 2025. Counsel submitted that from the pleadings and the Applicant's Motion, the issues in this case center on the registration and enforcement of a legal charge over L.R. No. 209/11088/15, the registration and enforcement of an all-assets debenture dated 13th March 2023, and the alleged removal of directors, matters that properly fall within the realm of company law. In support, reference was made to the case of **Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna [2017] eKLR**.
8. In opposition, the Plaintiff filed submissions on 15th September, 2025. Counsel submitted that this court is a creature of the Constitution and statute as provided for under **Article 162 (2)(b)** of the **Constitution**. Pursuant to **Section 13** of the **Environment and Land Court Act**, as re-affirmed in **National Land Commission vs Afrison Export Import Limited & 10 others [2019] eKLR**, the court has jurisdiction over *inter-alia*, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals

and other natural resources, as well as land administration and management.

9. It was submitted that in the case of **Pepe Limited vs Kenya Railways Corporation & Others**, the court held that the creation of an interest in respect to the use of land as a commodity, falls under what is contemplated by **Section 13(1)** of the **Environment and Land Court Act** as other instruments granting any enforceable interests in land, and that the court further held that the term “interest in the use and enjoyment of land” includes not only the interest that a person may have for residential, agricultural, commercial, industrial and other purposes, but also interests in having the present use of land unimpaired by changes in its physical conditions.
10. Counsel submitted that the court in **Pepe Limited(supra)** found that it could deal with claims relating to the use of land which are commercial in nature including leases and tenancy agreements, as long as the substratum of the claim is the “use” and “occupation” of the land. Counsel also referenced the case of **Kanegeni vs County Government of Nyeri (Constitutional Petition E008 of 2022)[2024] KEHC 9796 (KLR)**.
11. It was submitted that the facts of the case of **Co-operative Bank of Kenya Limited vs Patrick Kang’ethe Njuguna & 5 Others [2017]eKLR** are different and distinguishable

from the facts of this suit since the subject matter in the Kang'ethe case was purely an accounting issue and sought to stop the intended sale of the land by public auction by the bank. Vide the present suit, it was submitted, the Plaintiff has raised issues which are hybrid and that the main issues revolve around land use and land administration, which can only be determined by this court

12. This court, it was urged, is clothed with the authority to grant permanent orders of injunctions in regard to land as well as to order the cancellation of entries on the land register and that the court is also empowered to deal with the issues of land administration as provided for under the Act, which also entails the decision-making of the use and management of the land by the registered owner.
13. In the instant case, the decision to charge the subject property without the involvement of the directors/shareholders of the Plaintiff is part of the land use and administration. Ultimately, it was submitted, the objections are unmerited.

Analysis and Determination

14. Having considered the Preliminary Objections and submissions, the sole issue that arises for determination is whether the Preliminary Objections are merited?
15. The law with respect to preliminary objections is now well settled. Law JA in **Mukisa Biscuits Manufacturing Co.**

Ltd. vs West End Distributors (1969) EA 696 at 700
stated that:

“...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. Examples are an objection to 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.”

16. Newbold, P further held:

“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.”

17. The Supreme Court in the case of **Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014]**

eKLR re-affirmed the principles as set out in the **Mukhisa Case(supra)** stating:

“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. Examples are an objection to 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 ... 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.”

- 18.** It is apparent from the foregoing that a preliminary objection should raise pure points of law, argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. Further, the Preliminary objection should be capable of disposing off the suit or application.

19. The court has no doubt that the jurisdictional challenge raised herein constitutes a proper preliminary objection. It calls for no ascertainment of facts, but rather, a characterization of the legal foundation and nature of the dispute vis-à-vis the court's statutory mandate, and is potentially dispositive of the entire suit. Indeed, the Supreme Court in **Munene vs Kingara & 2 others (Application 12 of 2014) [2014] KESC 27 (KLR) (24 April 2014) (Ruling)** affirmed that "jurisdiction is a pure question of law" and must be determined as a matter of priority.
20. Moving to the merits of the objections, it is trite that jurisdiction is everything. This position was succinctly captured by Nyarangi, J.A. in **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1** 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to

nothing. Jurisdiction must be acquired before judgment is given.”

21. Elaborating on the same, the Supreme Court in *In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling)* stated:

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“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.” The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself

jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

22. The Environment and Land Court and the High Court of Kenya are courts of equal status albeit with different jurisdictions. **Article 165(3)** of the **Constitution** vests the High Court with unlimited original jurisdiction in both civil and criminal matters, and authority to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened.

23. On the other hand, the broad jurisdiction of the Environment and Land Court is donated by **Article 162(2) (b)** of the **Constitution** which provides that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to- (b) the environment and the use and occupation of, and title to, land...”

24. Pursuant to the constitutional mandate above Parliament enacted the **Environment and Land Court Act, No 19 of 2011**. At **Section 13(2)**, the Act provides that:

“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.”

25. This court is also empowered to determine claims alleging the denial, violation, or threat to the constitutional right to a clean and healthy environment under **Articles 42, 69, and 70** of the **Constitution**. In addition, the court has the mandate to exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

26. In ***Republic vs Chengo & 2 others (Petition 5 of 2015) [2017] KESC 15 (KLR) (26 May 2017) (Judgment)***, the Supreme Court, delving into the jurisdictional limits of the superior courts noted:

“[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 specialised 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.

[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 suis 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."

27. This is the position. Despite the foregoing pronouncement however, jurisdictional questions have continued to surface in the nature of "cross-cutting," "cocktail," or "mixed grill" matters. These are disputes whose subject matter overlaps the mandates of either of the three courts.
28. So how is a court to determine such a matter. Initially, there were two schools of thought within the superior courts. One school favoured the 'pre-dominant purpose test' whereas the other school rooted for the 'pre-dominant issue before court test'.
29. 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 (2016) eKLR 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.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

30. Munyao, J was for the other test. In *Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited & Another [2018] eKLR* the Learned Judge expressed:

“ 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 necessarily 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.”

31. The Court of Appeal had an occasion to and dealt with the issue. In *Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates vs Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] eKLR* it held:

“We reiterate the position taken in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna (supra), that in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land. The dispute between the appellant and the respondent related to the professional undertaking given by the appellant to facilitate the land transaction between his client and the respondent’s client.

We could not have put it more clearly. A professional undertaking in a legal transaction is a separate contract between advocates that creates legal obligations anchored on professional relationship and etiquette between the advocates. It creates an independent cause of action separate from the transaction undertaken

by the advocates' clients. Such an independent cause of action is reflected herein in the OS lodged by the respondent (who was the plaintiff) wherein the respondent sought orders against the appellant (who was the defendant) that:

“the defendant do honour the professional undertaking dated 11th March 2016 and.....fully indemnify the clients in respect of all claims of interest to the tune of Kshs 800,000/= suffered by reason of breach of the defendant's professional undertaking.....”

[15] The dominant issue in the dispute that was before the learned Judge was the honouring of the professional undertaking, and not the land transaction between the advocates' clients. The undertaking had nothing to do with the environment, or the use and occupation of land, or title to land. The land transaction that the advocates' clients were engaged in was not in issue. The learned Judge therefore properly rejected the application to have the respondent's suit transferred to the ELC.”

32. Guided by the exposition by the Court of Appeal in *Joel Kyatha(supra)*, the court will adopt the pre-dominant issue test.

- 33.** By way of brief background, the Plaintiff, vide her Amended Complaint dated 17th June, 2025, seeks several reliefs. She seeks declarations that her removal as a director of the 3rd Defendant, together with that of the administrators of the estate of the late Cyrus Kariuki Waithaka, arising from the alleged meeting and resolutions of 17th May 2018, was illegal, null, and void.
- 34.** Further, that the charges registered by the 5th Defendant over L.R. No. 209/11088/15 on 12th April 2019 and 13th May 2019, as well as the registration of the all-assets debenture dated 31st March 2023, were unlawful and of no legal effect.
- 35.** The Plaintiff prays that the Chief Land Registrar be directed to cancel the said charges and entries, discharge the title, and surrender the original certificates of title held as security to her advocates for onward transmission to the rightful directors of the 3rd Defendant.
- 36.** Additionally, she seeks an order compelling the 1st, 2nd, and 3rd Defendants to provide a statement of account of rental income from the suit property from May 2018 to date, and that the net rental income be deposited in an interest-earning account and shared among the shareholders in proportion to their shareholding. Lastly, she seeks a permanent injunction restraining the Defendants, their agents, or assigns from charging, disposing of, or transferring the suit property without her written consent.

- 37.** It is the Plaintiff's case that she is a director and shareholder of the 3rd Defendant, together with the 1st and 2nd Defendants, and also serves as a joint administrator and beneficiary of the estate of the late Cyrus Kariuki Waithaka, who was the majority shareholder of the 3rd Defendant. The 3rd Defendant is the registered owner of L.R. No. 209/11088/15.
- 38.** The Plaintiff avers that she and the late Cyrus Kariuki Waithaka incorporated the 3rd Defendant on 9th December 2008, but upon his death in 2011, she, alongside the 1st and 2nd Defendants, his children and siblings, obtained Grant of Letters of Administration which were confirmed in 2014. She later appointed the 1st and 2nd Defendants as directors and transferred shares to them, thereby making them shareholders of the company.
- 39.** However, she contends that the 1st and 2nd Defendants conspired to illegally remove her and the estate's administrators as directors by forging company documents, including resolutions, minutes, and a resignation letter dated 17th May 2018, which falsely indicated that the deceased attended the meeting.
- 40.** The Plaintiff states that she only discovered the fraudulent changes in March 2022 after obtaining a CR12 from the Registrar of Companies. Following her complaint, the Registrar reinstated her as a director in August 2024 when

the 1st and 2nd Defendants failed to respond to official inquiries.

- 41.** She further avers that on 15th November 2024, she learned that the 1st to 3rd Defendants had unlawfully charged all the company's assets, including the suit property, to secure loans totaling Kshs. 309,250,000 from the 4th and 5th Defendants. The Plaintiff claims that the property generates substantial monthly rental income, but the 1st and 2nd Defendants have taken full control of the premises, failed to disclose rental proceeds, and denied her any income since 2018.
- 42.** She asserts that all actions taken by the 1st and 2nd Defendants, including her removal as director and subsequent dealings with the company's assets, are illegal, null, and void for having been done without her knowledge, consent, or lawful authority.
- 43.** The Defendants assert that these issues are primarily commercial in nature touching on matters relating to companies and charges. The Plaintiff, while conceding that the issues are indeed mixed grill, asserts that they primarily concern land management and administration. The orders sought, it is urged can be granted by this court.
- 44.** The court has carefully considered the pleadings and the reliefs sought. The Plaintiff is seeking for declarations that her removal as a director of the 3rd Defendant, together with that of the administrators of the estate of the late Cyrus

Kariuki Waithaka, arising from the alleged meeting and resolutions of 17th May 2018, was illegal, null, and void.

- 45.** Further, that the charges registered by the 5th Defendant over L.R. No. 209/11088/15 on 12th April 2019 and 13th May 2019, as well as the registration of the all-assets debenture dated 31st March 2023, were unlawful and of no legal effect.
- 46.** The Plaintiff prays that the Chief Land Registrar be directed to cancel the said charges and entries, discharge the title, and surrender the original certificates of title held as security to her advocates for onward transmission to the rightful directors of the 3rd Defendant.
- 47.** Additionally, she seeks an order compelling the 1st, 2nd, and 3rd Defendants to provide a statement of account of rental income from the suit property from May 2018 to date, and that the net rental income be deposited in an interest-earning account and shared among the shareholders in proportion to their shareholding. Lastly, she seeks a permanent injunction restraining the Defendants, their agents, or assigns from charging, disposing of, or transferring the suit property without her written consent.
- 48.** It is obvious from the prayers being sought that the main grievance by the Plaintiff are the entries that were made on the title in respect of 209/11088/15 on 12th April 2019 and 13th May 2019, as well as the registration of the all-assets

debenture dated 31st March 2023. These entries, according to the Plaintiff, are fraudulent and should be cancelled.

49. The issue of the alleged fraudulent change of Directors of the company is in support of the main prayers for cancellation of the entries made on the title, and the sharing of the collected rent. Therefore, the pre-dominant issue in this matter is the alleged fraudulent dealings with the title, which is within the preserve of this court.

50. For those reasons, the Preliminary Objections dated 7th May, 2025 and 19th June, 2025 are dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 27th day of November, 2025.

O. A. Angote
Judge

In the presence of;

Mr. Mungai for Plaintiff

Mr. Karwanda for 1st - 3rd Defendants

Mr. Moriasi for 4th and 5th Defendants

Court Assistant: Tracy