

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. E362 OF 2025**

**BENHUR MILTON MULONZIA**  
**MWANGANGI.....PLAINTIFF/APPLICANT**

**VERSUS**

**MOHAMED HASSAN.....**  
**DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling determines the Defendant’s Notice of Preliminary Objection (PO) dated **12<sup>th</sup> June 2025** challenging this Court’s jurisdiction on the footing that the dispute “relates to the use and occupation of and title to land” and therefore falls within the exclusive remit of the Environment and Land Court (ELC) under **Article 162(2)(b)** of the Constitution and **section 13** of the Environment and Land Court Act (ELC Act).
  
2. This dispute arises from a written agreement dated **24th November 2020** between the Plaintiff and the Defendant concerning **House No. 4 on L.R. No. 330/1315** (“the suit property”). The Plaintiff asserts that under the said agreement, he lawfully purchased the property from the Defendant and subsequently took possession and occupation thereof.

3. According to the Plaintiff, the agreement provided two alternative modes of compensation in favour of the Defendant, contingent upon the outcomes of **ELC Case No. 657 of 2016 (Milton Mulonzia Mwangangi v Buyuka Obonyo & Paul C. Onduso)** and an ongoing arbitration involving Shady Acres Limited. Those contingencies have not been met because the referenced cases remain pending.
4. The Plaintiff contends that, notwithstanding the subsistence of the agreement, the Defendant failed to furnish title documents, unlawfully evicted him, and on **16<sup>th</sup> January 2025**, instructed auctioneers to levy distress and proclaim the Plaintiff's movable property while he was out of the country. He asserts that this was done without any lawful order, judgment, decree, or adherence to the contractual dispute-resolution mechanism, particularly **Clause 7**, which mandates arbitration.
5. Consequently, the Plaintiff vide its application dated 3<sup>rd</sup> May 2025 seeks declaratory reliefs, injunctive orders, and damages for alleged breach of the sale/joint venture agreement, unlawful eviction, and unlawful distress.
6. The Defendant thereafter mounted the present Preliminary Objection vide a notice dated **12<sup>th</sup> June 2025**, seeking the striking out of the suit and the Plaintiff's application dated **3<sup>rd</sup> May 2025** on grounds that the dispute relates to the use, occupation, and title to land, and therefore lies within the exclusive jurisdiction of the Environment and Land Court (ELC) pursuant to Article 162(2)(b) of the Constitution and Section 13 of the ELC Act.
7. The Plaintiff has opposed the objection and asserts that the dispute is purely contractual. He further avers that in **Milimani ELC Civil Suit**

**No. E008 of 2025**, between the same parties, the Defendant previously argued before the ELC that the matter was contractual, and the ELC agreed, declining jurisdiction and directing that the matter be filed before this Court. The Plaintiff asserts that the present suit was filed in compliance with that directive.

8. It is against this background that the Court must resolve whether the Defendant's Preliminary Objection is well-founded.
9. The matter proceeded by way of written submissions, which the Court has duly considered. The Defendant, in support of the objection, filed their submissions dated 10<sup>th</sup> July 2025, whereas the Plaintiff's submissions are dated 11<sup>th</sup> July 2025.

### **Analysis and Determination**

10. Having carefully considered the objection and the parties' respective submissions, I find that the sole issue for determination is whether this Court has jurisdiction to hear and determine the present dispute.
11. It is settled law that jurisdiction is the foundation of judicial authority. As restated in **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR**, jurisdiction must be determined at the earliest opportunity, for without it a court must down its tools. According to the Court:

"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.”

12. The Defendant, citing among others, Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR), contends that the dispute is grounded in matters of use, occupation, and title to land, and therefore falls within the exclusive jurisdiction of the ELC.
13. The defendant asserts that the dominant issue is a land transaction involving alleged breaches of a land sale agreement under which the Plaintiff took possession of the suit property.
14. The Plaintiff takes the opposite view and argues that the dispute is **contractual** and arises out of the parties’ **Joint Venture/Sale Agreement** of 24th November 2020. He contends that his possession was lawfully derived from the agreement, and the gravamen of the dispute is breach of contract, including unlawful distress, unlawful eviction, and violation of the arbitration clause. He maintains that the dispute is not a contestation of land title, land use, or environmental rights.
15. The Plaintiff further points out that the Defendant had earlier succeeded in persuading the ELC in **ELC Civil Suit No. E008 of 2025 (where the suit was initially filed)** that the dispute was contractual and therefore outside the ELC’s jurisdiction. According to the Plaintiff, the ELC agreed with that position and directed that the matter be filed before the High Court Commercial Division. The Defendant does not deny participating in those proceedings.

16. Article **162(2)(b)** of the Constitution establishes courts with status equal to the High Court to hear disputes relating to the **environment and the use and occupation of, and title to, land**. The jurisdiction of such courts is expressed through **Section 13 of the ELC Act**, which includes disputes relating to land use planning, title, tenure, boundaries, **rents**, and related matters.
17. Conversely, Article **165(3)** grants the High Court **unlimited original jurisdiction** in civil matters, except where expressly excluded under Article **165(5)**.
18. The superior courts have developed a functional approach in determining jurisdiction where land and commercial issues appear intertwined. The key inquiry is the **dominant issue** arising from the pleadings. The Court of Appeal in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR), held that disputes not incidental to land use, such as mortgages, charges, or recovery of debts, fall within the High Court's jurisdiction and not ELC even if the subject matter relates to land. The Court stated that:

“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.....

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.”

19. Similarly, the same approach was taken by the Court of Appeal in Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] KECA 504 (KLR), where the Court stated that: -

“[12] 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.”

20. From the above, it is clear that a scrutiny of the pleadings is crucial to aid in the determination of whether the **dominant question** is commercial, and therefore falls within the jurisdiction of the High Court; or whether the dispute one that primarily relates to the environment and the use and occupation of, and title to, land, and therefore falls within the ambit of ELC.

21. A casual perusal of the pleadings reveals that the Plaintiff’s claim is anchored upon: alleged breach of the Joint Venture/Sale Agreement; alleged unlawful distress and proclamation of movables; alleged unlawful eviction; and alleged breach of an arbitration clause. These are fundamentally contractual claims, not proprietary ones.

22. While the suit property forms part of the context, the Plaintiff does not seek any orders relating to title, boundary, zoning, environmental rights, cancellation of title, or enforcement of proprietary interests. The reliefs sought are commercial and compensatory in nature.
23. The Defendant's reliance on the Plaintiff's previous occupation of the property does not convert the matter into one of land use. The Plaintiff's possession arose exclusively from the contractual arrangement. Whether the Defendant's actions constituted breaches of contract or unlawful self-help is firmly within the jurisdiction of this Court.
24. Significantly, this Court cannot ignore the procedural history set out in the Plaintiff's submissions that the ELC, when previously seized of the dispute, expressly found that the matter was contractual and beyond its jurisdiction. The Defendant participated in that process and cannot now approbate and reprobate by advancing mutually inconsistent positions before different courts. Such conduct amounts to forum shopping, which the Court must strongly discourage.
25. On the totality of the pleadings and submissions, the Court therefore finds that the dispute is **contractual and commercial in nature**. The presence of land in the background does not vest jurisdiction in the ELC.

26. For the foregoing reasons, the Defendant's **Preliminary Objection dated 12th June 2025 is hereby dismissed** with costs to the Plaintiff.

27. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> JANUARY 2026.**



**HON. JUSTICE MOSES ADO**  
JUDGE

**In the presence of: -**

*C/A - Moses*

.....for the Defendant/Applicant

..... for the Plaintiff/Respondent