

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. E006 OF 2025

IN THE MATTER OF ; ARTICLES
1,2,3,,6,10,19,20,21,22,23,27,28,40,47,48,60,162(1),165
,232,258(1) AND 259(1) OF THE CONSTITUTION OF
KENYA,2010

AND

IN THE MATTER OF SUCCESSION OF THE ESTATE OF ISYA
GABABA CHEGE

AND

IN THE MATTER OF ELIZABETH ISAYA & SUSAN DIRAM
GABABA

AND

IN THE MATTER OF UNCONSTITUTIONAL,UNFAIR
SUCCESSION,SUBDIVISION,REGISTRATION AND/OR
DISPOSITION OF ANCESTRAL LAND IN THE ESTATE OF
ISAYA GABABA CHEGE

BETWEEN

ELIZABETH ISAYA.....1ST PEITIONER/APPLICANT

SUSAN DIRAM GABABA.....2nd
PEITIONER/APPLICANT

VERSUS

division of the suit parcel of land, cancellation of the same and having the suit title revert to the deceased name, to enable proper succession to be undertaken by the entire family. Finally, the petitioners sought to be awarded damages for violation of their rights and that a permanent injunction do issue to restrain the respondents from purporting to administer the estate without due Succession process being undertaken.

3. The court did give directions that the Notice of Motion be collapsed into the petition and in response the 2nd respondent did file his replying affidavit dated 23rd July 2025 and preliminary objection on a point of law dated 17th November 2025 objecting to the jurisdiction of this court to determine the said petition. The 3rd and 4th respondents also filed their replying affidavit dated 16th November 2025, largely supporting the said petition.
4. In their preliminary objection filed under **Order 51 Rule 14(1) of the Civil Procedure Rules, 2010**, the 2nd respondent raised the following grounds of objection.

a) THAT this Honourable court lacks jurisdiction to determine the instant Petition and Application all dated 4th June 2025 under Article 165(5)(b) of the Constitution in respect of matters falling within the jurisdiction of the court contemplated in Article 162(2),(b) of the Constitution.

b) THAT Section 13(1) and(2) of the Environment and land court Act provides that

the Environment and land court shall have original and appellate jurisdiction to have 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, it shall have power to hear and determine disputes;

- i) Relating to environmental planning and protection, climate issues, land use & planning, title, tenure, boundaries, rates, rent, valuations, mining, minerals and other natural resources.**
 - ii) Relating to compulsory acquisition of land.**
 - iii) Relating to land administration and management.**
 - iv) Relating to public, private and community land and contracts, choices in action or other instruments granting any enforceable interests inland; and**
 - v) Any other dispute relating to environment and land.**
- c) THAT Honourable court lacks jurisdiction to entertain this petition and Notice of Motion Application on matters that relates to disputes of deceased person's estates, dependents and beneficiaries as it offends the mandatory provisions of Section 47 and 48 of the Succession Act, Cap 160 and Section 73 of the probate and Administration Rules (legal Notice No 104 of 1980), Laws of Kenya.**
- d) THAT the petitioners have no cause of action whatsoever before this court as the Petition**

presently filed is incurable defective, devoid of merit and premature and ought to be dismissed with Costs.

B. PARTIES SUBMISSIONS

(i) The 2nd Respondent Submission

5. The 2nd respondent relied on his submissions dated 27th November 2025, where he reiterated that the court lacked jurisdiction to hear and determine the issues raised in the petition and application as they squarely fell within the jurisdiction of the Environment & land court pursuant to provisions of **Article 162(2) of the Constitution as read with Section 13(1),(2)&(3) of the Environment and land court Act, Cap No 19 of 2011, Laws of Kenya.**
6. It was evident from a cursory reading of the pleading filed that the petitioners were seeking reliefs relating to land ownership, use, occupation and distribution disputes arising between family members/beneficiaries of a deceased person with respect to land parcel **MARSABIT/MOUNTAIN/11** and all the above issues squarely fell within the realm of the Environment and land court and/or the succession court, thus outside the purview and jurisdiction of this court. Reliance was placed in the case of **Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) Eklr, Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696, & Lemita Ole Lemein Vs Attorney General & 2 others (2020) Eklr.**

7. Finally, it was also the 2nd respondent's contention that not every violation of the law had to be litigated through a constitutional petition, and where there was an alternative remedy through statutory law, the same had to be utilized first. In other words, the petitioners had wrongly moved the constitutional court and ought to have filed a normal claim before the Environment and land court. Reliance was placed in the case of **Bernard Murage Vs Fine Serve Africa Limited & 3 others (2015) eKLR & law Society of Kenya Vs National Environment Management Authority (NEMA) & 4 others (Petition E257 of 2025) 2025 KEHC 13482 (KLR)**, which quoted **Republic Vs Karisa Chengo & 2 others (2017) eKLR** where it was emphasized that the mere presence of a constitutional question does not bring a matter into the high court domain if the dispute lies squarely within the jurisdiction of the specialized court.

8. The 2nd respondent therefore urged the court to uphold the preliminary objection raised and be pleased to strike out the petition for being filed in a court without jurisdiction to hear and determine the same.

(ii) **The Petitioner submissions.**

9. The petitioners relied on their submissions dated 16th December 2025, where they insisted that this court was the primary court empowered under ***Article 22(1) as read with Article 165 of the Constitution*** to handle matters where violation of rights or fundamental freedom has been

pleaded as denied, violated, infringed or threatened. The petitioners had in their pleadings brought out the violation perpetrated by the respondents in fine details/with a reasonable degree of precision and thus could not be shut out from the corridors of justice. Reliance was placed in **Anarita Karimi Njeru Vs Republic (1979) Eklr, Oluoch Vs Omulo & Another (Miscellaneous Civil Application E339 of 2023), (2024) KEHC 1798 & Trusted Society of Human Rights Alliance Vs Attorney Gneral & 2 Others (2012) eKLR.**

10. The predominant test of the issues to be determined tilts the motion and petition in favour of the same being heard by the high court and thus urged the court to dismiss the preliminary objection filed and hold that the petition was properly filed before the court with inherent jurisdiction to hear and determine the same.

(C) **DETERMINATION**

11. I have considered the pleadings filed, the preliminary objection raised and the submissions filed by the respective parties. It is trite law that the preliminary objection must be dealt with and disposed of first before the substance of the main suit/peition is dealt with.

12. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same was set out in the case of **Mukisa Biscuits Manufacturing Ltd -vs- W**

est End Distributors (1969) EA 696, Where at page 700 **Law JA** 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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, at page 701, **Sir Charles Newbold, P.** stated:

“ 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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this is improper practice should stop”.

13. Similarly, in **John Mundia Njoroge & 9 others Vrs Cecilia Muthoni Njoroge & Another (2016) eKlr**, the Honourable court outlined the grounds which could form the basis of a preliminary objection; -

(i) Lack of jurisdiction over the subject matter of the action or the person of the respondent, improper venue or improper form or service of a writ of summons or a complaint;

- (ii) Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;**
- (iii) Insufficient specificity in a pleading;**
- (iv) Legal insufficiency of a pleading (demurrer);**
- (v) Lack of capacity to sue, non-joinder of a necessary party or misjoinder of a cause of action; and**
- (vi) Pendency of a prior action or agreement for alternative dispute resolution,” (Emphasis mine)**

11. The issue raised by the 1st respondent, is a pure point of law since they challenge jurisdiction of this court to hear and determine the said petition on grounds that the issues raised substantially relate to ownership , use, occupation of land parcel **MARSABIT/MOUNTIAN/11** and thus the same falls under provisions of **Article 162(2)(b) of the Constitution of Kenya 2010 as read with Section 13(1) and (2) of the Environment and Land Court Act No 19 of 2011** and thus should be determined by the Environment & land Court.

1. The locus classicus on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA.** relying, inter alia, on the above cited treatise by **John Beecroft Saunders** held as follows:

...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.

2. This issue too was reiterated what the Court of Appeal stated in **Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported)** in a decision rendered on 8th February, 2022 where they stated that : -

Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of

both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

3. The petitioners aver that they are daughters of the late ***Isaya Gababa Chege (deceased)***, who owned the suit parcel of land and after his demise, the respondents had unprocedural and illegally procured title deed to the said suit parcel and had threatened to evict them therefrom, yet it was the only home they had known. The said acts were discriminatory and had deprived them of their right to inherit a portion of their father's land, without the succession process being undertaken.
4. The petitioners thus urged this court to hold that their rights had been infringed upon by the respondents' illegal actions, and thus should proceed to cancel all new titles arising from sub divided mother title. They also prayed for damages and a permanent injunction to restrain the respondents from dealing within the suit parcel without undergoing a proper and lawful succession process, which includes the petitioners.

5. The Environment and Land Court (ELC) in Kenya has exclusive, original, and appellate jurisdiction to hear matters regarding land and environment, as established under **Article 162(2)(b) of the Constitution** and the **Environment and Land Court Act No.19 of 2011**.
6. **Article 162(2)(b) of the Constitution** provides as follows:

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

a.....; and

b. the environment and the use and occupation of, and title to, land.

7. Relying on the authority granted by **Article 162 of the Constitution**, Parliament proceeded to enact the **Environment and Land Court Act No.19 of 2011** that established the Environment and Land Court to exercise jurisdiction as provided for in **Section 13 of the Act** as follows:

In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

- ii. relating to compulsory acquisition of land;
- iii. relating to land administration and management;
- iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- v. Any other dispute relating to environment and land.

8. The Supreme Court in **Republic Vs Karisa Chengo & 2 Others (2017) Eklr** guided as follows:

“(50)... it needs to be emphasized that status is not the same thing as jurisdiction. the Constitution though does not define the word ‘status’. The intentions of the framers of the Constitution in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialized jurisdiction but they are not the High Court.”

(51)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...”

9. The Superior Court went on to further state that:“ ...

[52] ... 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.”

10. Additionally, in **Mohammed Said v County Council of Nandi [2013] KEELC 139 (KLR)** the Court observed that:

“The general jurisdiction is set out in Section 13 (1) which emphasizes that the E&LC has both 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 the Environment & Land Court Act, or any other law applicable in Kenya relating to environment and land.... A plain reading of Section 13 (3) will demonstrate that the jurisdiction of the court is not limited only to hearing matters touching on violations of Articles 42, 69, and 70 of the Constitution. That section does not state that the E&LC is only to hear the matters set out in Articles 42, 69 and 70 of the Constitution. The section for whatever reason, is emphasizes the jurisdiction of the court to hear petitions touching on the environment. There is no preclusion to hear any other petition, grounded on any other Article of the Constitution, so long as it falls within the purview of land and environment.

18.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 and the Industrial Court. This is set out in Article 165 (5) of the Constitution.”

11. Equally in **Mugweru & 4 others (Being the administratrices of the Estate of Maaka Mukuhi Mugweru (Deceased)) v National Land Commission & 5 others; Estate of Samuel Mugweru Wathirwa & another (Interested Parties) [2022] KEHC 13252 (KLR)** the Court held that:

“134. My interpretation of the preceding Section is that the jurisdiction of the Environment and Land Court is founded on the existence of any dispute with relation to land or environment. In essence therefore where the substratum of a dispute is founded on such, the matter should be exclusively dealt with in the Environment and Land Court...”

I am guided by the Court of Appeal who speaking to this matter in the case of Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others [2016] eKLR opined as follows:

“This Court considered the issue in Prof. Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012 and in Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of

the Constitution. The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that the Constitution contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute.

12. Evidently, the pre-dominant issue raised in this petition related to the ownership, use, possession of land parcel **MARSABIT/MOUNTAIN/11** and whether the petitioners have a right to inherit their share therein. These issues without any shadow of doubt rest for determination before the Environment and land court.

13. Before I pen off, though not the main substratum of the preliminary objection the 2nd respondent also raised a valid point that not all violations of law must be raised before the high court as a constitutional issue, where there exists alternative remedy through statutory law and where such exist, it is desirable that such statutory remedy be pursued first. See **Bernard Murage Vs Fine Serve Africa Limited & 3 others (2015) Eklr.**

14. The petitioners basically plead that the respondents fraudulently acquired the estate property. That is a question of fact and not a constitutional issue, which should be

determined by a normal suit filed before the Environment and land court.

C. DISPOSITION

- 15. In the circumstances I do find merit in the preliminary objection raised by the 2nd Respondent and strike out petition herein with costs to the 2nd respondent.
- 16. The same are assessed at **Kshs.150,000/=** plus VAT due thereon.
- 17. It is so ordered.

Read, signed, and delivered virtually at **MARSABIT** on this **16TH** day of **FEBRUARY**, 2026.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the **virtual platform, Teams** this **16TH** day of **February 2026**.

In the presence of;

N/Afor Petitioner

N/Afor Respondent

Mr. JarsoCourt Assistant

ORIGINAL