

REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION NO. E003 OF 2025

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 28, 40 & 43 OF
THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED VIOLATION AND/OR
THREATENED VIOLATION OF THE RIGHTS OF THE PETITIONERS
OF LUKENYA WEST, KATHAMA & SYOKIMAU MAVOKO COMMUNITY

BETWEEN

MAVOKO MUUNDANI RESIDENTS

ASSOCIATION & 55 OTHERS.....
.....PETITIONERS

VERSUS

KCB BANK KENYA LIMITED.....1ST
RESPONDENT

EAST AFRICA PORTLAND

CEMENT COMPANY LIMITED.....2ND
RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD
RESPONDENT

AND

ZAKARIA MOHAMMED LUKMAN.....1ST INTERESTED
PARTY

ANAB MAALIM MOHAMED.....2ND INTERESTED
PARTY

JELLE DUBO ABDI.....3RD INTERESTED
PARTY

RULING

The Petitioners commenced this suit by a Petition dated 07/02/2025. The Petitioners' claim relates to Land Reference No. 8786 and LR No. 8784 ("**suit land**") originally registered in the name of the 2nd Respondent, EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED and later charged to the 1st Respondent KENYA COMMERCIAL BANK LIMITED. The Petitioners contend that they are members of Lukenya West, Kathama and Syokimau Mavoko Community who have resided on the suit land for over 15 years. That the suit land has been the locus of significant investments by the Petitioners, including the development of homes, churches, schools, hospitals and other critical infrastructure, thereby transforming the area into a self-sustaining community.

The Petitioners further claim that the 2nd Respondent transferred the suit land to the 1st Respondent, KENYA COMMERCIAL BANK LIMITED, in partial satisfaction of a financial obligation owed by the 2nd Respondent to the 1st Respondent. The Petitioners assert that the 1st Respondent has offered to sell the suit land to them but at a price that is grossly exorbitant, exceeding three times the prevailing market value, and which is unaffordable for the Petitioners, thereby violating their Constitutional rights.

Together with the Petition the Petitioners filed a Notice of Motion dated 07/02/2025 which is spent by orders issued in a ruling delivered on 26/06/2025.

The 1st Respondent has now filed a Preliminary Objection dated 25/06 2025 seeking that the entire suit be struck out on the grounds stated as follows;

- 1. The jurisdiction of this Honourable Court has been improperly invoked as the underlying dispute is on the rights and the use of the subject land for which the Environment and Land Court is vested with jurisdiction as contemplated by Article 162 (2) (b) of the*

Constitution of Kenya and Section 13 (2) of the Environment and Land Court Act;

- 2. The Petitioners offend and are in conflict with a subsisting decision with the issues in rem in light of the judgment in Machakos ELC No. 155 of 2016-East Africa Portland Cement vs Sammy Kathilu & 272 Others that determined that all persons that were not the registered proprietors of the suit properties that had built houses, schools, churches and other establishments were trespassers with no enforceable rights in the land;*
- 3. The actions and/or omissions complained of by the Petitioners i.e. valuation of the properties and terms of engagement regularisation of its ownership raise no constitutional issues and ought to have been canvassed by way of a regular plaint.*
- 4. The 1st Respondent, as the registered proprietor of the suit property following the determination in **Milimani High Court Miscellaneous Application No. E1322 of 2020, KCB Bank Kenya Limited -Vs- East African Portland Cement Limited**, enjoys the indefeasible right to dispose of its property as it so wishes by virtue of Article 40 of the Constitution and as such, the Petitioners' prayers are untenable.*

Parties elected to argue the Preliminary Objection by way of written submission which I have read and carefully considered.

1st Respondent's Submissions

The 1st Respondent submitted that the Petitioners' grievances fall squarely within the ambit of the Environment and Land Court as envisaged by Article 162 (2) (b) of the Constitution of Kenya as read with Section 13 (2) of the Environment and Land Court Act. Article 162 (2) (b) of the Constitution reads as follows:

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.**

Additionally, Section 13 (2) of the Environment and Land Court Act reads 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—

- (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.

The 1st Respondent submit that the terms of engagement concern the use of the land and the parties' tenure thereon. In essence, the terms of engagement determine the right of the Petitioners to use the land hence use of land. Guidance was by the 2025 Court of Appeal decision in **Pumwani Riyadhha Mosque Committee & Another v Gikomba Business Centre Limited [2025] KECA 1257 (KLR)** wherein the Bench deliberated as follows:

“There is no doubt that the jurisdiction of the Environment and Land Court entails disputes related to land use planning and tenure...According to the Sessional Paper No. 1 of 2017 on National Land Use Policy, land use is defined as follows: “Land use refers to the activities to which land is subjected to and is often determined by; economic returns, socio-cultural practices, ecological zones and public policies. In the context of this policy, land use is defined as the economic and cultural activities practiced on the land”

Having established the foregoing, a review of the plaint and the lease agreement will determine whether the dispute fell within the provisions of section 13 of the Environment and Land Court Act or otherwise. Through the agreement in question, the respondent leased the suit property from the appellants for economic activities and agreed to pay the appellants a monthly rent in consideration of occupation and use of the suit premises. From the plaint, some of the alleged particulars of breach are “interfering with the business operations of the respondent and violation of the terms of the lease agreement.” Additionally, one need not look further than Part 1 of the lease agreement and paragraphs 6-11 of the plaint to conclude that the lease agreement concerned the use of the suit property and the respondent’s tenure thereon.....In the instant matter, the respondent had leased the land and put up structures thereon for leasing out. The land was therefore being used in the terms contemplated by Article 162(2)(b) of the Constitution, and the dispute arising from the lease agreement between the parties squarely fell in the province of the Environment and Land Court.

Conversely, the terms of engagement of the regularization process that are subject to the instant Petition provide for the

Petitioners' use and occupation of the suit property. Flowing from the dicta of the Court of Appeal decision, a dispute over the same is in the province of the Environment and Land Court Act as contemplated by the Article 162 (2) (b) of the Constitution of Kenya as read with Section 13 (2) of the Environment and Land Court Act.

The 1st Respondent further submit that the Petitioners do not have the requisite locus to seek intervention of this Honourable Court or any other Court to protect or enforce any rights in the suit property. This is because they were adjudged trespassers by the in rem judgment in **East African Portland Cement Co Ltd & 6 others v Kathilu & 322 others; Kenya National Organization for Victims of Ethnic Clashes & others (Interested Party) [2024] KEELC 7095 (KLR)** where Justice Ochieng determined the Petitioners and all other similar persons to be trespassers with no rights in the land. Justice Ochieng determined as follows:

*“Based on my analysis above, I find that the Defendants including Interested Parties have indeed trespassed on the Plaintiff’s land by building houses, school and churches thereon knowing fully well the said suit properties did not belong to them... A declaration be and is hereby issued that the Plaintiff is entitled to exclusive and unhindered right of possession and occupation of parcels of land known as LR No. 12948/17, LR No. 10425, **LR No. 8784**, LR No. 7815/1 and **LR No. 8786**.*

That the Petitioners, therefore, have no recognizable right in the suit property as the same was determined by a Court of competent jurisdiction. Reference was made to the decision of Justice Munyao Sila in the case of **Parkire Stephen Munkasio & 14 others (suing on their own behalf and behalf of their families and all the members of the Maasai Community living on land reference No.8396**

(I.R 11977) situated in Kedong) v Kedong Ranch Limited & 8 others [2015] KEHC 2531 (KLR) confirmed that trespassers cannot seek to enforce any rights in property. He determined as follows:

“To me it matters not whether they are in occupation of it, or they are outside it, at least in so far as the right to property is concerned. If they are in occupation, they are in occupation as trespassers since they have not demonstrated any right over the property which may be protected.... My conclusion therefore is that the petitioners have not demonstrated any right over the suit property which may be protected and there has been no infringement of their proprietary rights. There being no infringement of any proprietary rights, I do not see how the issue of compensation can come in. One cannot say that he is entitled to be compensated for land which he has no rights over. I therefore, in addition to finding that there has been no violation of the Constitutional right to property, find that there has been no violation of the right to compensation.”

The 1st Respondent beseeched the court to exercise similar mind and find that the Petitioners having been adjudged as trespassers have no rights capable of protection and enforcement in the suit land.

It was argued that following the 1st Respondent registration as the registered proprietor of the suit property, it enjoys the indefeasible right to dispose of its property as it so wishes by virtue of Article 40 of the Constitution and as such, the Petitioners’ prayers are untenable. Article 40 of the Constitution dictates and provides for the protection of the right to property. In realizing Article 40 of the Constitution, Parliament enacted Sections 24 and 25 of the Land Registration Act which provide as follows:

“24. Interest conferred by registration

The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

25. Rights of a proprietor

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

That the Constitutional and statutory provisions affirm the rights of the 1st Respondent as the registered proprietor of the suit property. As such, the 1st Respondent is at liberty to dispose of its property as it deems fit. The Petitioners, therefore, cannot then seek to limit how the 1st Respondent disposes its property on the basis that they would prefer different terms.

Reliance was placed in the decision in **Nyachongi & 4 Others v Nyachongi & 2 Others [2024] KEELC 3983 (KLR)** wherein the Court determined:

“In our case, the appellant was the registered proprietor of the land parcel No.1622. It was common ground that this was land that was purchased by him. Nothing barred him from dealing with it as he desired. He was free to sell the whole of the land and even waste its proceeds if that is what he wished..... It was not for the trial court to now trash the wisdom of the absolute proprietor in disposing his free property and substitute it for what the court thought was a fair and equitable distribution..... The court could not implant

its own tenets of fairness and equity to deny the absolute proprietor his freedom to dispose his property as he preferred. There is no power given to any court to order a person to gift or deal with his free property in a particular way."

It was further submitted that the Petitioners seek to have this Honourable Court overstretch its mandate by limiting the rights of the 1st Respondent as the registered proprietor of the suit property and further determining the terms that the 1st Respondent ought to dispose of said property.

Petitioners' Submissions

The Petitioners submitted that upon perusal of the record herein coupled with the averments made by each respective party herein, it is evident that the subject matter of the dispute herein is the 1st Respondent has offered to sell the Suit Land to the Petitioners who have partially complied paying the Kshs.200,000/= initial instalment of buying their respective plots of land but the same as set by the 1st Respondent is at a price that is grossly exorbitant, exceeding three times the prevailing market value, and which is unaffordable for the Petitioners, thereby violating their constitutional rights to own property and affordable housing and those are primarily disputes of civil in nature and would therefore fall within the jurisdiction of the High Court.

The Petitioners quoted the Court of Appeal in the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna, Edward Njuguna Kangethe, George James Kangethe, Nguru Auctioneers, Leakey Auctioneers & Joserick Merchants Auctioneers [2017] KECA 79 (KLR)** when it rendered itself thus:

"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 hereinabove. S 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".

The Petitioners submitted that while exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, Section 13 of the ELC Act and Section 150 of the Land Act; none of which concern the determination of questions of land prices that is grossly exorbitant, exceeding three times the prevailing market value. violating the Petitioner's constitutional rights to own property and affordable housing and consequently, this dispute does not fall within any of the areas envisioned by the said provisions.

The Petitioners concluded that the jurisdiction of the High Court over pricing matters and violation of human rights matters is without doubt, under Article 165(3) of the Constitution which provides inter alia, that; 1. subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters."

That from the foregoing, this Court should therefore be satisfied that the nature of the dispute; and consequently, the Petition herein; falls well within the purview of the High Court and therefore, this court has jurisdiction in the matter. The Preliminary Objection raised by the 1st Respondent is not merited and should be dismissed with costs to the Petitioners.

Interested Patrie's Submissions

The Interested Party while applying the principles in **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors (7969) EA 696 at page 700** to the present case, submitted that it becomes clear that the 1st Respondent's objection does not raise any pure point of law. Instead, the Respondent invites this Court to embark on a factual inquiry into the "true nature of the dispute," whether the Petitioners are trespassers, whether the regularization process is a land dispute, and whether the Petition ought to fall under the Environment and Land Court. Each of these enquiries requires evaluation of evidence, interpretation of pleadings, and determination of the predominant character of the dispute the very inquiries that Mukisa Biscuit strictly prohibits at the preliminary stage.

Moreover, the 1st Respondent's contention that this dispute falls within the exclusive jurisdiction of the Environment and Land Court is fundamentally misplaced. Jurisdiction is not determined by the geographical location of the property, nor by the fact that land is involved in the background, but by the predominant nature of the issues placed before the Court. The Petitioners' case and equally the Interested Parties' position centres on constitutional violations, including the right to equality, dignity, property, fair administrative action, and socio-economic rights under Articles 27, 40, 43, and 47 of the Constitution.

That equally important, the Respondent's reliance on the alleged "in rem effect" of the 2016 ELC judgment cannot be properly canvassed at this stage. Whether the Petitioners or Interested Parties fall within the class of persons bound by that judgment; whether their occupation is distinguishable; whether the judgment applies to the current regularization scheme; or whether new constitutional violations have arisen subsequent to the judgment are factual questions requiring evidence and analysis. Multiple courts have held that res

judicata is rarely determinable through a preliminary objection where facts and parties must be examined. To do so here would require this Court to descend into the merits, contrary to the strict boundaries laid down in *Mukisa Biscuit*.

That the 1st Respondent's argument that, as proprietor, it enjoys "indefeasible rights" under Article 40 is an argument on the merits of the Petition not an argument on jurisdiction. The scope and limits of Article 40 rights, particularly in contexts where proprietary conduct intersects with public interest or with constitutional rights of vulnerable communities, are substantive constitutional questions requiring full hearing. They do not qualify as threshold matters for a preliminary objection.

For these reasons, the Interested Party submitted that the Preliminary Objection is incapable of meeting the strict *Mukisa Biscuit* test. It raises contested facts, mischaracterises the dispute, attempts to oust the High Court's constitutional jurisdiction, and prematurely seeks to adjudicate the merits of the Petition. It is, respectfully, legally unsustainable and doctrinally infirm.

That in view of the foregoing, the 1st Respondent's Preliminary Objection is plainly unmerited. It does not raise a pure point of law as required under *Mukisa Biscuit*, but instead turns on contested facts, disputed characterisation of the Petition, and issues that can only be determined upon full evidentiary inquiry. The Petition raises substantive constitutional questions regarding equality, fair administrative action, property rights and socio-economic entitlements; matters which fall squarely within this Court's jurisdiction under Articles 22, 23 and 165(3) of the Constitution. The objection therefore cannot dispose of the Petition at this preliminary stage.

Analysis and Determination

The Court has considered the Preliminary Objection, the rival submissions and the pleadings as a whole and the main issue for determination is whether the preliminary objection is merited thus the pertinent issue in this case is whether the High Court has jurisdiction to hear the Petition herein.

In order for a matter to be taken by the Court as a Preliminary Objection, guided by the definition of a Preliminary Objection as acknowledged in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, it must be;

"..... 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".

In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

".....a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

The effect of the case law cited above means for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be a pure point of law; it must be pleaded by one party and admitted by the other; it must be a matter of law which is capable of disposing the suit; must not be blurred by factual details calling for evidence and finally must not call upon the Court to exercise discretion.

I have also considered the decision in **East African Portland Cement Co Ltd & 6 others v Kathilu & 322 others; Kenya National Organization for Victims of Ethnic Clashes & others (Interested Party) [2024] KEELC 7095 (KLR)** where Justice Ochieng determined that the Petitioners and all **other similar persons** to be trespassers with no rights in the land. This case related to Land parcel Reference No. 8786 and LR No. 8784 which is the same parcel of land in dispute in this instant Petition.

Article 40 of the Constitution dictates and provides for the protection of the right to property. In realizing Article 40 of the Constitution, Parliament enacted Sections 24 and 25 of the Land Registration Act which provide as follows:

“24. Interest conferred by registration

The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

25. Rights of a proprietor

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

That the Constitutional and statutory provisions affirm the rights of the 1st Respondent as the registered proprietor of the suit property. As such, the 1st Respondent is at liberty to dispose of its property as it deems fit. The Petitioners, therefore, cannot then seek to limit how the 1st Respondent disposes its property on the basis that they would prefer different terms. (See **Nyachongi & 4 Others v Nyachongi & 2 Others [2024] KEELC 3983 (KLR)**).

Therefore on the issue of jurisdiction, the Supreme Court in *The Matter of the Interim Independent Electoral Commission*, S.C. Constitutional Application No. 2 of 2011; [2011] eKLR, and in ***Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited and 2 Others [2012] eKLR***, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, Statute law, and judicial precedent. The Supreme Court stated:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.

In **Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1**, this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, inter alia:

“Jurisdiction is everything. Without it, a court has no power to make one more step. 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 trite law that where **Constitution** or **Statute** confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with **the Constitution** or the Statute conferring it.

The issue as to this Court’s jurisdiction can therefore only be determined by first answering the question whether this Court can effectively determine the nature of the claim herein.

It is without doubt that the Petitioners’ Claim is for interest in their investments which they have developed on the suit land for which they seek declarations and mandatory injunctions against the Respondents. A court of competent jurisdiction has already determined that the Petitioners and all other similar persons to be trespassers with no rights in the suit land.

Clearly, the Petitioners could be some of the Petitioners in that case or “**Other similar persons**” the court referred to.

Therefore, its this Court’s finding that the Petitioners’ grievances fall squarely within the ambit of the Environment and Land Court as envisaged by Article 162 (2) (b) of the Constitution of Kenya as read with Section 13 (2) of the Environment and Land Court Act.

In the end the Preliminary Objection is upheld. The Petition dated 07/02/2025 is hereby struck out.

Each party to bear their own costs.

Right of appeal 30 days.

Orders accordingly

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 3RD
MARCH 2026

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 3RD
MARCH 2026