

2. The Plaintiff also filed HCCC Nos. E023 of 2024; E024 of 2024; E026 of 2024; E027 of 2024 and E028 of 2024 against the 2nd-6th Defendants respectively, seeking similar prayers. By an order of this Court of 24.4.25, all the suits were consolidated with HCCC No. 22 of 2024 being the lead file.
3. In opposition to the suit Defendants filed a notice of preliminary objection (PO) dated 5.5.25 raising the following objections:
 1. ***That this Honourable Court lacks the jurisdiction to hear and determine the Plaintiff's consolidated suits on the ground that the dispute herein relates to the use and occupation of, and title to land to wit Land Portion Number 1371(Original Number 430/20 Malindi) which is outside the purview of this court.***
 2. ***That the consolidated suits herein are untenable as the same were instituted against the doctrine of exhaustion of available remedies considering that the dispute herein ought to be determined through Arbitration as mandatorily stipulated under clause 5.5 of the respective Leases.***
 3. ***That the Plaintiff's suit is fatally defective as it has failed to file an "Authority to swear affidavit" as mandated under order 4 rule 1(4) of the Civil procedure rules 2010 and filed the Plaints without the requisite mandated shareholders' resolutions of the Company.***
 4. ***That the consolidated suits herein are incompetent, premature and incurably defective, the same having been instituted in contravention of the mandatory Provisions of section 238 & 239 of The Companies Act 2015 which requires leave of court to be sought before such suits can be entertained.***
 5. ***That the consolidated suits herein are incurably defective and bad in law deserving to be struck out in limine, with costs to the Defendants.***
4. The undisputed facts herein are that the Plaintiff is the management company in respect of villas known as Johari Villas erected on of Land Portion Number 1371 (Original Number 430/20) Malindi (the suit property). The Defendants own villas in Johari Villas and shares in the Plaintiff.
5. In its plaint the Plaintiff seeks *inter alia* recovery of outstanding service charge and to exercise its right of forfeiture and peaceable re-entry into the Defendants' villas for default in payment of service charge, a condition in their respective leases.
6. The Defendants challenge the jurisdiction of this Court to hear and determine the Plaintiff's suits. It was submitted that as the subject matter in the suits is the use, occupation and title to

the villas erected on the suit property, the same falls within the exclusive jurisdiction of the Environment and Land Court (ELC).

7. For the Plaintiff, it was submitted that the matter does not fall within the jurisdiction of the ELC as the dominant prayer is the recovery of service charge and/or forfeiture arising from breach of contract with the management company.
8. The jurisdiction of the ELC Act is set out in Article 162(2)(b) of the Constitution and Section 13 of the ELC Act, which is to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Under Article 165(3) of the Constitution, the High Court has unlimited original jurisdiction in criminal and civil matters save for those within the exclusive jurisdiction of the Supreme Court, the ELC and the Employment and Labour Relations Act.
9. The jurisdiction question between the ELC and the High Court has been raging for a long time. Courts are often called upon to determine whether they have the requisite jurisdiction over cross cutting matters which touch on the jurisdiction of both courts. In determining this question, our courts must be guided by the constitutional imperative in Article 159(2)(d) of the Constitution, to administer justice without undue regard to procedural technicalities. This will save parties from unwarranted hardship occasioned by the striking out of pleadings.
10. In the case of **Butler & 4 others v Redhill Heights Investments Limited & another [2016] KEHC 1313 (KLR)**, Ngugi, J. (as he then was) alluded to the predominant test and stated:

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.

11. Similarly, in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR** the Court of Appeal considered the dominant issue and stated:

40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action

herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

41. 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.

12. The Court of Appeal noted that the dominant issue in that case was not the use of land but the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender. As such, it was the High Court, not the ELC that had jurisdiction over the matter.

13. The Court went on to state:

42. 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 accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the Constitution provides inter alia, that;

1. subject to clause (5), the High Court shall have-

a. unlimited original jurisdiction in criminal and civil matters.

14. By parity of reasoning, it is clear that where the dominant issue is a dispute over accounts such as outstanding service charge, then this Court will have jurisdiction.

15. Section 13(1) of the ELC Act provides that the ELC 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. Section 13(2)(d) provides:

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

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; (emphasis)

16. The ELC has jurisdiction to determine a dispute relating to private land and contracts granting any enforceable interest in land.
17. In the present suit, the issue in dispute revolves around service charge. It is alleged that the Defendants have been in arrears since 2020 and have declined to settle the same. The Plaintiff thus seeks payment of the same together with interest. Had this been the only issue, the matter would without a doubt, fall under the jurisdiction of this Court. However, the Plaintiff in addition, seeks a declaration that the Defendants are in breach of the lease. The Plaintiff also seeks to exercise its right of forfeiture and re-entry into the villas for breach of the terms of the lease. The Plaintiff also seeks that the defendants immediately vacate their respective villas. These prayers clearly relate to use, occupation and title to land which fall under the jurisdiction of the ELC and not this Court.
18. The question that then begs is, should the Plaintiff's claim be split so that the issue of the outstanding service charge be dealt with by this Court and the issue of breach of the lease, forfeiture, re-entry and vacant possession be filed in the ELC? The answer is in the negative. This would result in absurdity and occasion the Plaintiff undue hardship.
19. It is noted that the service charge demanded herein is in respect of common amenities as stipulated in Clause 2.1 of the exhibited lease. That service charge relates to the use and occupation of the villas as provided for under the lease. Further, the lease provides in Clause 5.4 that where any monies and payments remain unpaid even after notice has been issued, the lessor may with the consent of the court enter upon the villa and the lease shall absolutely determine. The lease is clearly a contract that grants an enforceable interest in land. In the premises, the matter herein falls under the jurisdiction of the ELC and not this Court. (See **Nakumatt Holdings Limited & another v Ideal Locations Limited [2019] KECA 153 (KLR)**)
20. On this ground alone, the Court finds that the preliminary objection is merited. I therefore find no need to address the other objections.
21. The upshot is that the preliminary objection is upheld with the result the consolidated suits herein are struck out with costs to the Defendants.

DATED SIGNED and DELIVERED in Malindi this 6th day of March 2026

M. THANDE
JUDGE