Kanja & another v Mwendwa & 2 others (Environment & Land Case E029 of 2024) [2025] KEELC 928 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 928 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE E029 OF 2024

JO MBOYA, J

FEBRUARY 27, 2025

BETWEEN

JOANINA KANJA ..... 1ST PLAINTIFF

DAVID MUTWIRI MUTUERANDU ..... 2ND PLAINTIFF

AND

BEATRICE MWENDWA ..... 1ST DEFENDANT

VENENDETA NCHOGA MARETE ..... 2ND DEFENDANT

LAND REGISTRAR ..... 3RD DEFENDANT

RULING

1. The Plaintiffs/Applicants [hereinafter referred to as the Applicants] have approached the court vide Notice of Motion of Application dated 30th October 2024; and wherein the Applicants have sought for the following reliefs [verbatim]:

    i. The Honorable court is pleased to certify this matter as extremely urgent.

    ii. Pending the hearing and determination of this Application inter-parte; the Honorable court be pleased to issue orders Ex-parte restraining the Respondents by themselves or agents/ employees from entering, remaining on, evicting or interfering with the Applicants' peaceful possession of LR. No.Abothuguchi/Gitie/1143.

    iii. Pending the hearing and determination of the main suit; the Honorable court be pleased to issue orders restraining the Respondents by themselves or agents/employees from entering, remaining, evicting or interfering with the applicant's peaceful possession of LR. No. Abothuguchi/Gitie/1143.

iv. Pending the hearing and determination of the main suit, the Honorable court be pleased to issue orders staying the execution of order obtained in Githongo ELC Mis Application E005 of 2003.

v. The costs of this application be provided for.

2. The instant application is premised on the various grounds which have been highlighted and captured in the body of the application. In addition, the application is supported by the affidavit of one David Mutwiri Mutuerandu [the 2nd Applicant herein]. Suffice it to state that the affidavit under reference was sworn on 30th October 2024; and the deponent has annexed various documents including a copy of the certificate of title that was [sic] issued in favour of the Applicants on the 6th of August 2020.

3. Additionally, the instant application is also supported by a further affidavit sworn on 23rd December 2024 and wherein the deponent, namely, David Mutwiri Mutuerandu has annexed assorted documents including the proceedings vide Meru High Court Succession Case No. 78 of 2001, which was heard and concluded vide judgment/ Ruling rendered on 16th December 2022.

4. Upon being served with the instant application the 2nd Defendant filed an elaborate nay, comprehensive Replying affidavit sworn on 29th January 2025 and wherein the 2nd Defendant/Respondent has annexed assorted documents. In particular, the 2nd Defendant/Respondent has annexed a copy of the duly extracted order that was issued by Hon. Justice Edward Murithi, Judge; on the 16th of December 2022 and wherein the learned Judge decreed the cancellation of L.R No's Abothuguchi/Gitie/1143 and 1144, respectively.

5. Moreover the 2nd Defendant/ Respondent has also annexed a copy of the notice of eviction which was issued and served upon the applicants herein pursuant to the provisions of section 152 of the *Land Act*, 2012 [2016].

6. Furthermore, the 2nd Defendant/Respondent has also exhibited a copy of the ruling rendered by the Court of Appeal [Honourable Justice Muchelule, JA] pertaining to and concerning an attempt by the 1st Respondent to procure leave/extension of time to file an appeal against the judgment/decree issued vide Meru HCC Succession No. 78 of 2001.

7. The 1st Defendant/Respondent herein duly appointed and retained counsel who filed a Notice of appointment of advocates. Pertinently, the notice of appointment of advocate is dated 15th January 2025.

8. The 3rd Defendant/Respondent, namely, the Land Registrar duly entered an appearance but has not filed any response to the application.

9. The instant application came up for hearing on the 22nd of January 2025; whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions. To this end, the court ordered and directed that the submissions be filed and exchanged within circumscribed timelines.

10. The applicants herein filed written submissions dated 12th February 2025; whereas the 2nd Defendant filed written submissions dated the 14th February 2025. The 1st and 3rd Defendants did not file any written submissions. For good measure, learned counsel for the 3rd Defendant/ Respondent intimated that same shall be relying on or adopting the submissions by the Applicants.

11. The Applicants herein raised and canvassed three [3] salient issues for consideration and determination by the court. The issues raised by the applicants include that same [applicants] were condemned

unheard when the title to the suit properties were cancelled; that same have a prima facie case with a probability of success; and lastly, that same are disposed to suffer irreparable loss unless the orders sought are granted.

12. Regarding the first issue, namely; that the applicants were condemned unheard by the High Court when the certificate of title was cancelled, learned counsel for the Applicants has submitted that the Applicants herein were not parties to and in respect of Meru HCC Succession Cause No. 78 of 2001, wherein the order[s] canceling the certificate of Title of the suit properties was issued.

13. To the extent that the Applicants were not parties to the suit before the High Court, it has been contended that the orders which were issued thereunder and including the cancellation of the title of the suit property was made and or issued in contravention of the rules of natural justice; the due process of law and the right to fair hearing.

14. Secondly, the counsel for the Applicants has submitted that the Applicants herein bought/purchased the suit property from the 1st Defendant/Respondent who at the material point in time was the registered proprietor/owner thereof. In this regard, it has been contended that the Applicants herein are bona-fide purchasers for value without notice of any defect in the title of their predecessor, namely, the First Defendant/ Respondent herein.

15. Arising from the fact that the Applicants herein are bona-fide purchasers of the suit property, learned counsel for the Applicants has submitted that the Applicants have therefore espoused a prima facie case with probability of success. To this end, it has been contended that the Applicants have met and or satisfied the requisite conditions established vide the decision in Giella vs Cassman brown (1973) E.A 358 and Nguruman Ltd vs Jan Bonde Nielsen & another (2014) eKLR, respectively.

16. Lastly, learned counsel for the applicants has submitted that following the purchase/acquisition of the suit property, same [Applicants] entered upon and took possession of the suit property. Furthermore, it has been contended that the applicants have since built and or established permanent structures on the suit property.

17. Further and in addition, it has been posited that the Applicants built on the suit property in the year 2019 and thereafter same [Applicants] have been in occupation and possession of the suit property to date.

18. Arising from the foregoing, learned counsel for the Applicants has implored the court to find and hold that the Applicants have established and proven the existence of a prima facie case with probability of success. Furthermore, it has been contended that the Applicants have also demonstrated a likelihood of irreparable loss arising and/ or accruing, unless the orders sought are granted.

19. The 2nd Defendant/Respondent filed written submissions dated 14th February 2025; and wherein the same [2nd Defendant] has highlighted four [4] salient issues for consideration. Firstly, learned counsel for the 2nd Defendant/Respondent has submitted that the title of the suit property was the subject of Meru HCC Succession Cause NO. 78 of 2001, wherein the High Court found and held that the certificate of title in respect of the suit property, [which is a sub-division of plot No. 716] , was illegal, unlawful and void.

20. Furthermore, learned counsel for the 2nd Defendant/Respondent has submitted that to the extent that the cancellation of the title of the suit property was undertaken vide an order issued by the High Court, this court which has equal status [standing] with the High Court cannot purport to review the orders and decisions emanating from the High Court, including the decision under reference, or at all.

21. Premised on the foregoing, learned counsel for the 2nd Defendant/Respondent has submitted that this court is devoid and divested of the requisite jurisdiction to entertain and adjudicate upon the suit and by extension the application beforehand. In this regard, learned counsel for the 2nd Defendant/ Respondent has implored the court to find and hold that the suit beforehand is not only misconceived and legally untenable but constitutes an abuse of the due process of the court.

22. Moreover, learned counsel for the 2nd Defendant/Respondent has submitted that the instant suit is a deliberate and calculated scheme by the Applicants to invite the Environment and Land Court to sit on appeal on the decision of the High Court. To this end, it has been submitted that the issuance of any orders in respect of this matter shall be tantamount to invalidating the orders of the High Court which orders have neither been reviewed nor appealed against.

23. Secondly, learned counsel for the 2nd Defendant/Respondent has submitted that if the applicants are convicted that same [applicants] were not heard before the High Court or better still, that same [Applicants] are aggrieved by the decision of the High Court, then it behooves the applicant[s] either to seek review before the High Court or appeal to the Court of Appeal, where apposite.

24. Additionally, it has been submitted that the issues that have been raised and canvassed by the Applicants at the foot of the application herein are issues that can only be dealt with or canvassed before the High Court [being the court which issued the impugned orders] or the Court of Appeal. For coherence, it has been contended that the issues being canvassed fall outside the jurisdictional remit/purview of the Environment and Land Court.

25. Thirdly, learned counsel for the 2nd Defendant/Respondent has submitted that the issues raised and canvassed vide the instant suit and by extension, the application beforehand, are barred by the doctrine of res judicata. In particular, it has been submitted that the questions of the validity or otherwise of the Certificate of Title of the suit property, which is a sub-division of plot no. 716, was the subject of the proceedings before the High Court. Furthermore, it has been contended that the Applicants herein were privy to and knowledgeable of the said proceedings. In any event, it has also been posited that the interests of the Applicants, [if any], were duly represented by the 1st Defendant/Respondent, who is the person who [sic] sold the suit property to the applicants.

26. Arising from the foregoing submissions, learned counsel for the 2nd Defendant/Respondent has submitted that even though the Applicants were not directly parties in the succession matter, their interests were duly represented by the 1st Defendant/Respondent, who was a party thereto. In this regard, it has been submitted that the Applicants herein are therefore bound by the doctrine of res judicata and by extension, the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

27. Finally, learned counsel for the 2nd Defendant/Respondent has submitted that the title to and in respect of the suit property was cancelled and or revoked pursuant to the orders of the High Court issued on the 16th December 2022. To the extent, that the title to the suit property was revoked and cancelled, it has been submitted that the suit property which underpins the instant suit is therefore non-existent.

28. Furthermore, learned counsel for the 2nd Defendant/Respondent has submitted that in so far as the suit property is non-existent the Applicants herein cannot be heard to contend that same [Applicants] have any lawful rights and or interests over and in respect of a non-existent property. In this regard, it has been posited that no rights can accrue and or arise from a non-existent property.

29. Based on the foregoing, learned counsel for the 2nd Defendant/Respondent has submitted that the Applicants herein have neither established nor proven the existence of a prima facie case with a

probability of success. In the absence of a prima facie case with a probability of success, it has been submitted that the Applicants are not entitled to an order of temporary injunction or at all.

30. Other than the foregoing, learned counsel for the 2nd Defendant/Respondent has also submitted that the prayer for stay of execution of the eviction orders that were issued vide Githongo PMCC Misc Application E005 of 2023, cannot issue in the absence of any appeal having been filed against same.

31. Instructively, it has been submitted that the orders of stay of execution sought can only issue in accordance with provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010; and not otherwise. In particular, it has been submitted that prior to and or before the issuance of an order of stay of execution, it is incumbent upon the applicants to demonstrate that same have since filed an appeal against the said Order[s] and not otherwise.

32. Flowing from the foregoing submissions, learned counsel for the 2nd Defendant/Respondent has invited the court to find and hold that the subject application is not meritorious. To this end, the court has been implored to dismiss the application with costs to the 2nd Defendant/Respondent.

33. The 1st Defendant/Respondent intimated to the court that same shall not be filing any written submissions. On the other hand, the 3rd Defendant/Respondent chose to adopt and rely on the submissions filed on behalf of the Applicants.

34. Having considered the pleadings filed by the parties and upon taking into account the submissions canvassed by the advocates, I come to the conclusion that the determination of the instant application and by extension the suit beforehand, turns on three [3] salient issues, namely; whether the suit vide Plaint dated 30th October 2024; discloses a reasonable cause of action; whether this court is seized of the requisite jurisdiction to entertain the suit and by extension the application; and whether the applicants have established a prima facie case with a probability of success.

35. Regarding the first issue herein, namely; whether the suit beforehand and by extension the application discloses a reasonable cause of action, it is imperative to state and underscore that the applicants herein were the registered owners of the suit property. Furthermore, it is also common ground that the suit property arose from and or is a subdivision of L.R No. Abothuguchi/Gitie/716, [which is the original parcel] and which was the subject of the proceedings before Meru HCC Succession Cause No. 78 of 2001.

36. Additionally, there is no gainsaying that Meru HCC Succession No. 78 of 2001 [the Succession Cause] was heard and disposed of vide ruling rendered on 16th December 2022; and whereupon the learned Judge of the High Court [Honourable Justice Muriithi, Judge] issued the following orders;

    i. The Preliminary objection dated 11th February 2022 is dismissed.

    ii. The sub-division of Abothuguchi/Gitie/716 into Abothuguchi/Gitie/1143 and 1144 is hereby cancelled.

    iii. That Abothuguchi/Gitie/716 shall be registered in the name of the applicant [Venendeta Nchoga Marete].

37. Suffice it to state that the decision of the High Court [details highlighted in the preceding paragraphs] has neither been reviewed, varied or and appealed against. For good measure, it is not lost on this court that an attempt by the 1st defendant/respondent to procure an extension of time to file an appeal to the court of appeal was declined vide the ruling rendered on 28th June 2024.

38. Despite the foregoing factual and legal scenario, the applicants have now approached this court and same are seeking a plethora of reliefs. In particular, the applicants are seeking to have this court declare

that same [applicants] are the lawful owners of the suit property. Furthermore, the applicants are also seeking a declaration that same were/are bona-fide purchasers for value without notice of any defect in the title of their predecessors, namely, the 1st Defendant/Respondent.

39. What I hear from the Applicants is to the effect that same require this court [Environment and Land Court] to interrogate the manner and circumstances surrounding the invalidation and cancellation of inter- alia the certificate of title in respect of the suit property.

40. Pertinently, the cause of action being canvassed and ventilated by the applicants is to the effect that same were condemned unheard, as pertains to [sic] the cancellation of the Certificate of title of the suit property. Suffice it to recall and reiterate that that the cancellation was undertaken following the revocation of Grant of Letters of Administration in accordance with the provisions of Section 76 of the Laws of Succession Act, Chapter 160, Laws of Kenya.

41. The question that I must ask myself and endeavor to answer is whether the allegations by the applicants taken as against the decree issued by the High court vide Meru HCC Succession cause no. 78 of 2001, disclose a reasonable cause of action known to law or at all.

42. Before endeavoring to answer the question, it is apposite to discern the meaning of what constitutes a reasonable cause of action. To this end, it suffices to adopt and reiterate the definition that was supplied by the Court of Appeal in the case of Kigwor Company Limited v Samedy Trading Company Limited [2021] eKLR where the court stated and held that;

In the Court of Appeal case of Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR Justice Waki held that:-

> "A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint."
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> That definition was given by Pearson J. in the case of Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs. Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:-
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> "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."
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> Lord Diplock, for his part in Letang vs. Cooper [1964] 2 All ER 929 at 934 rendered the following definition:-
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> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."
>
> When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy ..."

43. What constitutes a reasonable cause of action was also elaborated upon in the case of Rajesh Pranjivan Chundasama vs Sailesh Pranjivan Chundasama (2014) eKLR where the Court of Appeal stated and held as hereunder;

> Besides, the Respondent seemed to have confused the issue of locus standi and a cause of action. In Alfred Njau & Others v City Council of Nairobi (supra) this Court had occasion to discuss the two. They stated:

> "Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ..."
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> The court proceeded to state:
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> "To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

44. Duly guided by the principles espoused by the Court of Appeal in the decisions [supra], I am now disposed to revert to the matter and to discern whether the factual and legal matrix underpinning the subject suit disclose/capture a reasonable cause of action. Instructively, a reasonable cause of action must be that cause of action, which merits due interrogation and adjudication by a court of law. Furthermore, the factual situation must espouse and evince a factual scenario that deserves the attention of the court.

45. To my mind where the factual matrix and the legal issues sought to be espoused by a party, the applicants herein not excepted, have been addressed and determined by a court of competent jurisdiction then such a factual matrix cannot underpin a reasonable cause of action or at all.

46. In respect of the instant matter, the Applicants and their Legal Counsel are knowledgeable of the decision of the High Court rendered vide the succession cause. However, the applicants herein have neither appealed nor sought to review the said decision. For good measure, the applicants herein have the liberty and latitude to impugn the decision of the High Court, albeit in the manner prescribed under the law.

47. Nevertheless, the applicants herein cannot hide their head under the sand and purport to approach this court under the guise of seeking to impugn and or invalidate the orders of the High Court, which is a Superior Court of record. Such an endeavor, is not only capable of breeding absurdity but is tantamount to inviting anarchy into the corridors of justice.

48. Suffice it to underscore that the Plaint dated 30th October 2024; and the application thereunder do not disclose and or espouse a reasonable cause of action known to law or at all.

49. I am aware that striking out of a suit on account of want of cause of action or better still, non-disclosure of a cause of action is a draconian measure. For coherence, striking out is tantamount to driving the claimant away from the seat of justice. However, in befitting circumstances and situations, a court of law is obligated to resort to and deploy striking out as a mechanism for protecting the rule of law and the general administration of justice. [see the decision of the Court of Appeal in D.T Dobie Ltd vs Muchina [1982] eKLR.

50. Moreover, striking out can also be resorted to and deployed to avert abuse of the due process of the court or to achieve the ends of justice. Notably, it is the rule of the thumb that parties can only approach the court to canvass live controversies but not to engage the court in a circus. [See the provisions of Section 1B of the *Civil Procedure Act*, Chapter 21, Laws of Kenya]

51. Be that as it may, I come to the conclusion that the issues raised and canvassed at the foot of the instant matter do not raise and or espouse any reasonable cause of action or at all. At any rate, it is imperative to underscore that no amount of amendments can redeem the suit beforehand. Simply put, in the absence of a reasonable cause of action, the entirety of the proceedings beforehand constitutes a waste of precious judicial time, which is the only asset that this Court; and by extension, Courts of Law possess.

52. As concerns the second issue, namely; whether this Honourable court is seized of the jurisdiction to entertain and adjudicate upon the subject dispute, it suffices to highlight and underscore that the decree culminating into the cancellation of the certificate of title of the suit property was issued by the High court.

53. For good measure, the Applicants are privy to and knowledgeable of the same position. Furthermore, the fact that the certificate of title of the suit property was cancelled vide Orders emanating/ arising from the succession cause has been amplified [highlighted] at the foot of paragraphs 10 and 14 of the Plaint dated 30th October 2024.

54. Notwithstanding the fact that the Applicants are privy to and aware of the said decision of the High Court, it is common ground that the Applicants herein have neither sought to review and or appeal against same. Notably, the said decision, which was rendered on the 16th of December 2022 remains in-situ [in existence].

55. Nevertheless, the applicants are now before this court and same are contending that the High court of Kenya, which is a constitutional creature has violated their [Applicants] rights. Furthermore, the Applicants are now asking the Environment and Land court to [sic] superintend and supervise the High court and according to the applicants; to quash the decision of the High Court albeit by sidewind.

56. To my mind, the entirety of the suit and the proceedings beforehand are geared towards violating the constitutional architecture. Pertinently, the High court; the Employment and Labour Relations Court; and the Environment and Land Court, are Courts of Equal status and standing. The only dichotomy is in the jurisdiction and mandate vested upon the same.

57. However, the Environment and Land court, which is a superior court just like the High Court, cannot supervise and or superintend the High court. Such a scenario, if it were to happen would culminate into absurdity. It must never happen. It must never be imagined and/ or conceived.

58. Without belaboring the point, it is imperative to take cognizance of the decision of the Supreme Court [the apex court] in the case of Karisa Chengo vs Republic (2017) eKLR, where the court at paragraph *50* stated and held thus;

> It is against the above background, that 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 specialized 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.
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> In their words:
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> "By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day, however, ELRC and ELC are not the High Court and vice versa. However, 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 the performance of its judicial function, in its specialized jurisdiction but they are not the High Court."

59. In the case of Kenya Hotel Properties Limited *v Attorney General & 5 others (Petition 16 of 2020)* [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment), the Supreme Court underscored the legal position that neither the High court nor the Employment and Labour Relations court, nor the Environment and Land court is subordinate to the other.

> We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves. Again, we take cognizance of our finding in the Samuel Kamau Macharia case where we held that:"A court jurisdiction flows from either *the Constitution* or legislation or both.
>
> Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation." [emphasis supplied].

60. Flowing from the erudite exposition of the law, in terms of the authoritative decisions of the Supreme Court, [which by virtue of Article 163 (7) of *the Constitution* 2010 are binding on this court], I come to the conclusion that I have no jurisdiction at all to superintend and or supervise the High court. In addition, I have no jurisdiction to overrule or upset a valid decision of the High court. To this end, the subtle, albeit mischevious invitation by the Applicants herein must be met with a resounding answer in the negative.

61. Before departing from this issue, it is instructive to highlight that a court of law, this court not excepted, must act within the parameters of the law. Furthermore, a court of law can only exercise such jurisdiction as conferred upon the court by *the constitution*, the statutes or both. For good measure, where the court is divested of jurisdiction, the court must down its tools at the earliest moment. [See the decision of the Supreme Court in Samuel K, Macharia versus Kenya Commercial Bank Limited and Others [2012] eklr, at paragraph 68 thereof].

62. The critical nature of jurisdiction was highlighted by the Supreme Court in the case of; In the In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling) where the court stated as hereunder;

> 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."
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> 30. 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*.

63. Without much hesitation, I come to the conclusion that this court is devoid and divested of jurisdiction to entertain and adjudicate upon the subject matter. In this regard, the entirety of the proceedings before the court are null and void. [see the decision of the court of appeal in the case of Phoenix of East Africa Assurance Co. Ltd vs S. M Thiga T/A Newspaper Service (2019) eKLR, at Paragraphs *1* & 2 thereof].

64. Notwithstanding the findings in terms of issues one and two above, I beg to venture forward and address the question of whether the applicants have established a prima facie case with a probability of success. Pertinently, an order of temporary injunction can only be spoken to and or sought by a person who is able to establish a prima facie case with probability of success in the first instance and not otherwise.

65. What constitutes a prima facie case is now trite and established. In the case of Mrao Ltd vs First American Bank of Kenya Ltd (2003) eKLR, the Court of Appeal stated as hereunder;

> A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. [See also Nguruman Limited versus Jan Bonde Nielsen and Others [2014] eklr]

66. While discussing issue number one, I came to the conclusion the suit beforehand does not disclose any reasonable cause of action. The question that then arises is whether a prima facie case can be espoused where the suit itself is [sic] dead before arrival.

67. In my humble view, the applicants herein have neither espoused nor demonstrated a prima facie case with probability of success. Simply put, the suit that is being canvassed by the applicants is dead in the water. It is incapable of redemption. Further proceedings in respect of same, is tantamount to wasting precious judicial time.

68. Having failed to espouse and or demonstrate a prima facie case, this court is not enjoined to venture forward and interrogate whether the applicants are exposed to suffer irreparable loss. Suffice it to underscore that an applicant seeking to procure an order of temporary injunction must surmount the hurdles highlighted in Giella vs Cassman Brown (1973) E.A 358, sequentially. In this regard, the moment the applicant fails to prove a prima facie case, the court must not engage further.

69. The legal position pertaining to the foregoing observation, namely, that where an applicant fails to prove the existence of a prima facie case with a probability of success, then the court is not enjoined to venture forward and interrogate the likelihood of an irreparable loss accruing was highlighted in the case of Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol.I EA 86.

70. For coherence the Court of Appeal stated thus;

> "If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without hurdles in between."

Final Disposition:

71. Flowing from the analysis, [whose details are captured in the body of the ruling], I come to the conclusion that the suit by the Applicants herein is not only premature and misconceived, but same constitutes an abuse of the due process of the court.

72. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder:

    i. The suit be and is hereby struck out.

    ii. The application dated 30th October 2024 be and is hereby struck out.

    iii. Costs of the suit and the application be and are hereby awarded to the 2nd Defendant/Respondent only.

    iv. The interim orders of status quo hitherto granted be and are hereby discharged.

73. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 27TH DAY OF FEBRUARY, 2025

OGUTTU MBOYA

JUDGE

In the presence of

Mr. Mutuma – Court Assistant

Mr. Ogada Obila for the Plaintiff/Applicant

Ms. C. Karwitha for the 2nd Defendant/Respondent

Ms. Miranda for the 3rd Defendant/Respondent

No Appearance for the 1st Defendant/Respondent