



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kahia Transporters Limited & another v Chunky Limited & 8 others (Civil Appeal E011 of 2022) [2025] KECA 183 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 183 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E011 OF 2022  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**KAHIA TRANSPORTERS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**TRADE LEAD LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CHUNKY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**WURLY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**SAHAL AHMED DAHIL ..... 3<sup>RD</sup> RESPONDENT**

**PATRICK NDUNE ..... 4<sup>TH</sup> RESPONDENT**

**MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT .... 5<sup>TH</sup>  
RESPONDENT**

**LAND REGISTRAR ..... 6<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

**EDWARD KIGURU ..... 9<sup>TH</sup> RESPONDENT**

*(Being an appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (N. A. Matheka, J.) dated 19th January 2021 In Petition No. 9 of 2018)*

**JUDGMENT**

1. Before us is an appeal from the ruling of the ELC at Mombasa (N. A. Matheka, J.) dated 19<sup>th</sup> January 2022 in ELC Petition No. 9 of 2018. The précis of the appeal is that five related cases were filed in



- the Environment and Land Court at Mombasa and in the High Court of Kenya at Mombasa by the parties herein in respect of several parcels of land (the suit properties).
2. The appellants, Kahia Transporters Limited and Trade Lead Limited, filed ELC Case No. 273 of 2017 against the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, Chunky Limited and Curly Wurly Limited. The appellants' case was that they were the respective registered owners of the parcels of land known as Plot Nos. 5141 and 5153/VI/MN and Plot No. 5154/VI/MN situate at Mombasa County; that, sometime in July 2017, the 1<sup>st</sup> and 2<sup>nd</sup> respondents trespassed onto the parcels and began massive excavation without the appellants' consent; and that, despite formal notice to cease trespassing onto the properties, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had failed and/or refused to comply. The appellants sought injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> respondents; an order for punitive damages and costs of the suit.
  3. In turn, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed ELC Petition No. 9 of 2018 (formerly No. 34 of 2017 against the appellants, Patrick Ndune (the 3<sup>rd</sup> respondent), Sahal Ahmed Dahil (the 4<sup>th</sup> respondent), one Mohamed Abdi Khaiye, the Ministry of Lands Housing & Urban Development (the 5<sup>th</sup> respondent), the Chief Lands Registrar (the 6<sup>th</sup> respondent), the County Lands Registrar, The National Land Commission (the 7<sup>th</sup> respondent), the Attorney General (the 8<sup>th</sup> respondent) and Edward Kiguru (the 9<sup>th</sup> respondent). The 1<sup>st</sup> and 2<sup>nd</sup> respondent's case was principally that they were the respective registered proprietors of the property comprised in the title registered in the Land Titles Registry at Mombasa as Plot Nos. MN/VI/909 and MN/VI/910; that the said properties fell within the jurisdiction of the County Government of Kwale for purposes of payment of rates; that, on 29<sup>th</sup> June 2016, certain individuals visited the properties, alleged that the properties belonged to them and threatened to invade the properties to assert their property rights; that the 1<sup>st</sup> respondent carried out investigations and discovered that the properties had three fresh titles issued over them comprising in Plot Nos. MN/VI/5154, 5153 and 5141 registered in the names of the appellants in strange circumstances; that the said titles were issued fraudulently and unlawfully; that a survey of the property confirmed that the land in question belonged to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and that the creation of the titles purportedly relied on by the appellants were fraudulent and in breach of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' constitutional rights. The 1<sup>st</sup> and 2<sup>nd</sup> respondents sought declaratory orders; an order for nullification and cancellation of the titles registered in the appellants' names; injunctive orders; compensation by way of damages for the unlawful interference with their proprietary rights; and costs of the petition.
  4. The appellants then filed ELC Case No. 405 of 2017 against the 7<sup>th</sup> respondent (the National Land Commission). The appellants' case was that their parcels of land had a boundary dispute with 20 other parcels of land situate at Mombasa within Mombasa County, and which were subject to compulsory acquisition by the 7<sup>th</sup> respondent, including the two parcels registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that there was pending a suit in ELC Case No. 273 of 2017 touching on Plot Nos. MN/VI/909 and 910, and that there was an investigation as to the genuineness of the two title deeds; and that any intended payments for the disputed plots ought to be withheld pending the determination of the boundary disputes. The appellants sought various declaratory orders; an order of prohibition and inhibition restraining the 7<sup>th</sup> respondent from transferring any money in respect of acquisition touching on the 20 parcels; and costs of the suit.
  5. Joining the judicial fray, one Julius Kea Mbawa filed HC Petition No. 4 of 2021 (formerly No. 202 of 2018) against the Director of Criminal Investigations and the Director of Surveys, with the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the appellants, the 7<sup>th</sup> respondent and the Judicial Service Commission as interested parties. The petitioner's case was that he was one of the registered proprietors of Plot No. 224/VI/MN situated at Kwale County and sharing a common boundary with the 1<sup>st</sup> respondent's property Plot No. MN/VI/909; that there was no boundary disputes between himself, the appellants and the 1<sup>st</sup>



- and 2<sup>nd</sup> respondents; that the appellants were attempting to wrongfully and fraudulently stake claim to the compensation payable towards the compulsory acquisition of his property; that despite reporting the invasion of his property, and despite letters from various Government agencies to the Director of Surveys and Director of Criminal Investigations requesting them to clarify the registration status of the deed plans and titles in respect of the parcels registered in the names of the appellants and the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the two offices had remained silent on the issue. The petitioner sought declaratory orders, an order compelling the Director of Criminal Investigations to release the report of his investigations and to compel the Director of Surveys to give a report on the deed plan registrations relating to the ownership of Plot No. MN/VI/909; and costs of the petition.
6. Finally, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed ELC Case No. 92 of 2020 against the 6<sup>th</sup> respondent (Chief Lands Registrar) and the appellants. Their case was that, sometime in January 2015, the Government issued a Gazette Notice No. 149 stating its intention to acquire their properties to wit Plot Nos. MN/VI/909 and 910; that the land was subsequently compulsorily acquired for construction of the Mombasa – Nairobi Standard Gauge Railway; that a stay order was issued in favour of the appellants stopping the payment of the compensation duly owed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that they participated in Petition No. 4 of 2021 where the court allowed an application to order the Director of Criminal Investigations and Director of Surveys to release their reports to resolve an ownership dispute over Plot No. MN/VI/909; that the Director of Surveys issued a report dated 24<sup>th</sup> August 2018; that the said report confirmed that the appellants’ deed plans were erroneously surveyed; that the said deed plans were used by the appellants to create irregular/fake titles that were used to launch a claim for compensation leading to the stay orders that have kept the 1<sup>st</sup> and 2<sup>nd</sup> respondents from their due compensation; that, according to the report, it is now evident that the stay orders were granted as a result of material non-disclosure; that the appellants’ purported titles were therefore a nullity, void, of no effect and incapable of being relied on to assert a right to property; and that the continued delay in release of the compensation due to them was highly discriminatory and a violation of their constitutional rights.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents therefore sought a declaration that the titles issued to the appellants were null and void, and ineffectual to confer any right interest or title upon the appellants; orders for revocation of the deed plans and title deeds registered in the names of the appellants; and costs of the suit.
  8. Pending determination of the five suits, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a Notice of Motion dated 12<sup>th</sup> October 2021 in ELC Petition No. 9 of 2018 seeking orders that the petition be transferred to the ELC at Kwale for further directions; and that all matters related to the petition, namely: ELC No. 273 of 2017; ELC No. 405 of 2017; ELC No. 92 of 2020; and Petition No. 4 of 2021 (No. 202 of 2018), be transferred to ELC Kwale for further directions.
  9. The grounds on which the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s Motion was anchored were: that the court lacked the territorial jurisdiction to hear and determine the petition; that the subject parcels of land were located in Kwale County as evidenced by the various rates documents and survey records; that, admittedly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents initially filed the petition in the ELC at Mombasa because, at the time, there was no functional Environment and Land Court in Kwale County; that Kwale County now had a functional Environment and Land Court in which the petition and the related matters should be heard; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had contemporaneously filed an application to consolidate all the related matters; that section 12 of the *Civil Procedure Act* makes it mandatory for a suit to be filed in the court where the subject matter is situated; that section 19(2) of the Environment and Land Courts Act (the Act) provides that the court shall be bound by the procedure laid down by the *Civil Procedure Act*; that, where a court had no jurisdiction, there was no basis for a continuation of proceedings pending other



evidence; and that the court had the inherent jurisdiction to relocate a case from one Environment and Land Court to another.

10. The Motion was supported by the affidavit of Harji Govind Ruda, a director of the 1<sup>st</sup> respondent, sworn on 12<sup>th</sup> October 2021, and in which he deponed that the 1<sup>st</sup> respondent's Plot No. MN/VI/909 shares a common boundary with the 2<sup>nd</sup> respondent's properties comprised in Plot Nos. MN/VI/910 and MN/VI/224, which are all subject to the suit and the related suits, and lie in Kwale County where the 1<sup>st</sup> and 2<sup>nd</sup> respondents pay rates to the Kwale County Government; that the Kinango Sub-County Surveyor confirmed that the administration boundary and physical location of the adjacent Plot No. MN/VI/224 is located in Kwale County; that, in his plot verification report made on 25<sup>th</sup> October 2019, the District Surveyor Kwale County also confirmed that the physical location of the suit properties are in Kwale County; that the 1<sup>st</sup> respondent's advocate was served with a report in form of an affidavit by the office of the Directorate of Criminal Investigations through the office of the Attorney General touching on Plot No. MN/VI/909; that, in the said affidavit, the investigating officer confirmed that the issues relating to the ownership status and allegations of fraud were reported to Kinango DCI office in Kwale, a clear confirmation that the suit properties are situated in Kwale; that the 1<sup>st</sup> respondent's advocate was served with a report from the Director of Surveys on 4<sup>th</sup> June 2020 in compliance with court orders, which report stated that Plot No. MN/VI/909 was first surveyed in 1923 and issued with a deed plan No. 393141; that, on 28<sup>th</sup> September 2021, the court in a related Petition No. 64 of 2017 described the 1<sup>st</sup> respondent's Plot No. MN/VI/909 as private properties located in Kinango Sub-County, Mwamdudu Sub-location, Kwale County; and that it will prove expensive to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, if need be, to procure witnesses from Kwale to Mombasa.
11. The appellants opposed the application vide a replying affidavit sworn by Osman Ahmed Kahia, a director of the appellants, on 1<sup>st</sup> November 2021. He deponed that the appellants were the registered owners of Plot Nos. 5141, 5153 and 5154/VI/MN, which are all situated within Mombasa County and are registered at Mombasa District Land Registry; that two investigation reports in respect of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' title deeds were prepared by the National Lands Commission and the Ministry of Lands and Physical Planning whereby the two titles were found to be fake and/or forgeries and that, therefore, their authenticity was yet to be verified; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' title and transfer documents, as obtained in the petition, clearly indicate that the properties are situated in Mombasa and registered in the Mombasa District Land Registry; that the witnesses for all the parties reside in Mombasa and all the advocates for the litigants have their offices in Mombasa; that the ELC in Mombasa is therefore the proper court vested with the jurisdiction to hear and determine the petition and the related matters; and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were estopped from making the application since the court had the requisite jurisdiction.
12. The appellants also filed Grounds of Opposition dated 1<sup>st</sup> November 2021. They opposed the 1<sup>st</sup> and 2<sup>nd</sup> respondents' application on the grounds that the pleadings and prayers in their suit against the 1<sup>st</sup> and 2<sup>nd</sup> respondents in ELC No. 273 of 2017, as well as in Petition 405 of 2017 against the NLC, squarely placed the location of the suit properties within Mombasa County; that the appellants and the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not in agreement on whether the respective properties are situated in Mombasa County or Kwale County, which was a fundamental issue for determination by the court; that the court could not summarily make a determination on the prayer to transfer the suits to the ELC in Kwale before having the benefit of a full hearing and a consideration of evidence from both sides; that, if an order of transfer of the suits was made, then the appellants would be disadvantaged as the order would translate to a determination that the properties are in Kwale County thereby effectively denying the appellants a fair hearing of their claim; and that such a determination would be contrary to the rules of natural justice.



13. The appellants advanced further grounds in opposition to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' Motion, namely: that a perusal of the Transfer of the property claimed by the 2<sup>nd</sup> respondent revealed that it comprised of that parcel of land situate North of Mombasa Municipality in the District of Mombasa; that much could not be said of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' other property from the scant details contained in the Provisional Certificate of Title and would await adducing of evidence at the trial; that the annexures to the appellants' replying affidavit confirmed that all the properties claimed by the appellants and registered in their names fall within Mombasa County; and that, even from the available evidence, there was no reason why the matters should be transferred to the ELC in Kwale.
14. In addition to the foregoing, during the pendency of the said application, the suits were consolidated by consent of the parties on 19<sup>th</sup> October 2021 whereupon the court directed the parties to file submissions with respect to the said application.
15. In its ruling dated 19<sup>th</sup> January 2022, the ELC found that the Kwale County Surveyor produced survey maps and satellite imaging and confirmed that plot Nos. MN/VI/909 and 910 were situated in Kwale County; that there was prima facie evidence that the subject matter was situated in Kwale County, which now has an ELC Court; that any contentious issues could be determined in that court as ELC Courts have concurrent jurisdiction; and that no prejudice would be suffered by the respondents. The court therefore allowed the application as prayed.
16. Aggrieved, the appellants have filed this appeal against the ruling on the grounds that the learned Judge erred as a matter of law in transferring the suits before her to the ELC Court in Kwale when the pleadings before the court raised a fundamental issue for determination at the trial as to whether the properties forming the subject matter of ELC Case No. 273 & 405 of 2017 and Petition No. 9 of 2018 are situate in Mombasa County or Kwale County; by determining the said issue on the basis of an interlocutory application without affording the appellants an opportunity to be heard at a full trial, thereby effectively denying the appellants a fair hearing of their case and condemning them unheard; in proceeding to transfer the suits to the ELC in Kwale when the question of actual location of the suit properties remained a live issue for determination at the trial; in evaluating documents relating to parcel Nos. MN/VI/909 and 910, the subject of Petition No. 9 of 2018, and by concluding that all the properties the subject matter of the consolidated suits were situate in Kwale County, which is factually and legally wrong; in failing to evaluate the facts placed before the Court which clearly demonstrate that parcel Nos. MN/VI/5141, 5153 and 5154, the subject of ELC Case Nos. 273 and 405 of 2017, are all situate in the Municipality of Mombasa District; and in failing to evaluate the documents placed before the court.
17. In view of the matters aforesaid, the appellants pray that their appeal be allowed and the orders of the ELC set aside; that an order be made dismissing the Notice of Motion dated 12<sup>th</sup> October 2021 or, in the alternative, an order made that the suits filed by the appellants, ELC Case Nos. 273 and 405 of 2017 be heard in the ELC at Mombasa and not be transferred to the ELC at Kwale; and that the costs of the appeal and in the court below be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
18. The interlocutory appeal before us raises two main issues, namely: whether the learned Judge failed to evaluate the facts and documents placed before the court, leading to a wrong determination in her ruling; and whether the appellants were not afforded an opportunity to be heard, thereby effectively denying them a fair hearing and condemning them unheard.
19. In support of the appeal, learned Counsel for the appellants, M/s. Ahmednasir Abdullahi, filed written submissions as well as a List of Authorities and Case Digest, dated 2<sup>nd</sup> October 2024. Counsel cited the cases of Owners of the Motor Vessel "Lillian" v Caltex Oil (Kenya) Ltd [1989] eKLR for the



proposition that jurisdiction is everything and, without it, a court has no power to make one more step or continue proceedings; Joseph Kimani & another v James Kangara Kahanya [2017] eKLR for the proposition that an invoice must be supported with the payment receipt for it to be sufficient and strict proof of the expenditure; Gabriel Mwaura Njoroge & another v Agnes Waithira Kamau & 3 others [2021] eKLR where the ELC declined to grant a permanent injunction sought in an interlocutory application, holding that it would be pertinent for viva voce evidence to be adduced to enable the Court arrive at a proper determination of the dispute at hand; Korea Nyamai v Neema Parcels Limited [2021] eKLR for the proposition that the question of jurisdiction which is raised by way of a demurer has always to be decided on the allegations made in the plaint and not on the contentions that the defendant may raise and if the jurisdiction of the Court depends upon the proof of fact and the question as to the existence or otherwise of that fact is canvassed, the parties may lead evidence in support of the respective cases before the preliminary issue as to jurisdiction of the Court is decided; and Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR where this Court faulted the learned Judge in the court below for determining the entire suit on the basis of affidavit evidence without the benefit of a proper hearing entailing hearing and cross-examination of the witnesses.

20. Opposing the appeal, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, M/s. Ndegwa, Sitonik & Karina, filed written submissions and a List & Bundle of Authorities dated 2<sup>nd</sup> October 2024. Counsel cited the case of Livingstone Maina Ombete v Kenya Power & Lighting Company Limited [2017] eKLR where this Court upheld the decision of the High Court to make an order suo moto to transfer a suit before the Chief Magistrate's Court in Nairobi to the Chief Magistrate's Court in Kakamega; and where this Court held that the High Court had the powers to transfer the suit suo moto, and that the appellant therein had not demonstrated that he would suffer prejudice if the matter was transferred to Kakamega for hearing.
21. On the 1<sup>st</sup> issue as to whether the learned Judge erred in failing to evaluate the facts and documents on record thereby leading to the impugned ruling, we take to mind the learned Judge's observation with which the appellants take issue. In the words of the learned Judge:

“This court has considered the application and submissions therein. It is based on the grounds that this honourable court lacks the territorial jurisdiction to deal with this Petition. That the subject pieces of land are located within Kwale County as is evidenced by the various rate payments and survey documents. That admittedly the Petitioners initially filed this Petition on 28<sup>th</sup> July, 2017 in this honourable court as at the time no functional Environment and Land court in Kwale County had been set up. The Kwale County Surveyor submitted that the subject properties being MN/VI/909 & 910 are located near the Southern Bypass Highway.

He produced survey maps and satellite imaging and confirmed that the parcels are situated in Kwale County. The respondents object and state that the respective combatants are not in agreement on whether the respective properties are situate in the County of Mombasa or that of Kwale. I find that there is prima facie evidence that the subject matter is situated in Kwale County which now has an ELC Court. I find that any contentious issues can be determined in that court as ELC Courts have concurrent jurisdiction and I see no prejudice to be suffered by the respondents. I find that this application has merit and I grant it as prayed.”

22. Counsel for the appellants disagreed and submitted that the trial judge misdirected herself on the issue of territorial jurisdiction and ended up transferring the suits to the Kwale ELC without any plausible



reason or legal backing; that the ELC in Kwale lacks the necessary jurisdiction to adjudicate upon the issues presented in this case; that the title deeds pertaining to the disputed properties have been duly registered at the Mombasa County Land Registry, placing them squarely within the territorial jurisdiction of the ELC in Mombasa; that the record is replete with evidence that parcel Nos. MN/VI/909 and 910 are situate in Mombasa Municipality; that all records pertaining to the appellants and the 1<sup>st</sup> and 2<sup>nd</sup> respondents can only be traced to Mombasa County Land Registry; that the transfer document confirms that the parcels are situated in Mombasa Municipality; and that the Letter of Consent from the Land Control Board indicated that parcel No. MN/VI/910 is found in Changamwe/Miritini in Mombasa.

23. According to counsel, the purchase agreement for parcel No. MN/VI/910 reveals that the subject property is freehold; and that the transfer documents for parcels No. MN/VI/909 and 910 reveal that what was transferred was estates in fee simple, which therefore begs the question as to the purpose of the payment of rates alleged to have been made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to Kwale County if the land was freehold. Counsel contended that this was clear proof of forgery in view of the fact that the respondents produced property rates payment request, demand notice, clearance certificate and a bill without payment receipts to support the alleged payment. Counsel argued that, without payment receipts to prove actual payment, the court cannot rely on such evidence.
24. Counsel further submitted that the letter produced in court confirming the location of a parcel relates to parcel No. MN/VI/224 and not MN/VI/909 or 910; that the surveyor was not cross-examined to test the veracity of the alleged reports; that the learned Judge believed his letter word for word without allowing the parties to test the veracity of the information thereby provided; that the learned Judge, on whims, ruled that because there were property rates payment request, demand notice, clearance certificate and a bill produced before Court, then that was enough to prove that the said properties were in Kwale County; that the learned Judge also relied on a falsified or fabricated satellite image and alleged survey maps/plans that were not produced or attached to the application; that no survey maps were produced in court; and that no real time satellite image, as confirmed from Google Maps, looks like the one produced in this matter.
25. Counsel contended that, in the absence of survey plans and payment receipts, the court could not conclusively hold that the subject properties are located in Kwale County; and that it was only prudent for the Court to call for a viva voce hearing to allow parties test the veracity of the rivaling accounts of evidence.
26. On their part, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that section 12 of the *Civil Procedure Act* requires suits for the recovery of immovable property to be instituted, heard and determined in “the court within the local limits of whose jurisdiction the property is situate.” According to counsel, the evidence on record proved that the properties sought to be recovered in the suit to wit plot Nos. MN/VI/909 and 910, are situate in Kwale County; that, in support of their application, the 1<sup>st</sup> and 2<sup>nd</sup> respondents produced property rates payment requests and clearance certificates showing that the rates over the suit properties were charged, payable and paid to the Kwale County Government; that the respondents produced a survey report by the Kinango Sub-County Surveyor confirming that plot No. MN/VI/224, a parcel neighbouring the suit properties, is located within Kwale County; and that a topographic map sheet annexed to the report showed that the suit properties are located in Kwale County.
27. According to counsel, the respondents produced a plot verification report by the District Surveyor of Kwale where the District Surveyor made the definitive finding that plot No. MN/VI/224 is in Kwale County. In addition, counsel submitted that the respondents also produced an affidavit sworn by an officer from the Directorate of Criminal Investigations who confirmed that the report regarding the



fraud over the suit properties was first reported at the DCI offices in Kinango, Kwale County; and that the DCI report on the investigations on the suit properties stating that the DCI visited the land, which is located in Kwale County and established that there is no human activity therein. In conclusion, counsel submitted that, in the judgment delivered on 28<sup>th</sup> September 2021 in Petition No. 64 of 2017, and which was also produced by the respondents, the court described the suit property MN/VI/909 as private property located in Kinango Sub-County, Mwamdudu Sub-Location in Kwale County; that the judgment, and the finding that the property is in Kwale County, have not been set aside and remains binding on the appellants and the respondents, who were parties to the said petition; that on the other hand, the appellants, in opposition to the application, filed a replying affidavit and only produced purported title deeds over plot Nos. MN/VI/5141, 5153 and 5154 and transfer documents over the said plots, which documents are not credible evidence to prove the location of the suit properties as they are the very documents whose authenticity the 1<sup>st</sup> and 2<sup>nd</sup> respondents are challenging; and that the evidence is insufficient to prove the allegation that the suit properties are situated in Mombasa County.

28. The record as put to us, coupled with the comprehensive albeit rival submissions of learned counsel and the impugned ruling, which we have recited in part, clearly demonstrate the undeniable fact that the learned Judge addressed herself to the appellants' Motion, evaluated the facts and documents on record before pronouncing herself on the merits of the application leading to the impugned ruling. We find nothing on record to suggest that she did not take to mind the jurisdictional challenge in issue and its implication on the consolidated suits pending hearing in the ELC in Kwale. Whether it is inconvenient for the appellants to prosecute their claims in Kwale is not for us to judge. Be that as it may, the contentious claim over the trial court's jurisdiction or competence to hear the five consolidated suits would invariably be determined should the issue be raised.

29. In *Stefano Uccelli & another v Salama Beach Hotel Limited & 8 others* [2019] KECA 514 (KLR), this Court held that:

18. .... Jurisdiction is the cornerstone of the competence of a court to hear and determine any matter. The issue of a court's jurisdiction takes precedence and priority over any other issue that is pending before the court. A court must upfront and first determine if it has jurisdiction before determining any other issue before it. The starting and entry point that determines the competence of a court is its jurisdiction. 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 where Justice Nyarangi of the Court of Appeal held as follows

“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. 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.”

30. It is not lost on us that the Environment and Land Court, as established under Article 162(2)(b) of the [Constitution](#) and section 13(1) of the [Environment and Land Court Act](#), 2011 is vested with original and unlimited jurisdiction to hear any matter related to the environment and land. In addition, the court has the inherent jurisdiction to transfer cases in which it has jurisdiction from one ELC Court to another. Section 19(2) of the Act provides that the court “shall be bound by the procedure laid down by the [Civil Procedure Act](#) (Cap. 21)” much the same way as it binds the High Court in matters procedure, including power to transfer cases to corresponding stations.



31. In this regard, Order 47 rule 6 of the Civil Procedure Rules reads:

6. Place of trial [Order 47, rule 6]

1. Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such place as the court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.
2. The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:

Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.

32. Another consideration that the court may take into account when considering whether to transfer a case to another place for trial, if the matter concerns land, is the possibility that the court may want to view the land, as was observed by Waweru, J. in *Sahal Agro-Holdings Limited v Agricultural Development Corporation* [2013] KEHC 6119 (KLR). No doubt, this is a matter of the trial court's discretion that would invariably hold as long as it is exercised judiciously.

33. We form this view taking to mind the hallowed principle that "to whom much is given, much is required." One of the latitudes given to judges and judicial officers in the course of their work is judicial discretion. Black's Law Dictionary, 10<sup>th</sup> Edition defines judicial discretion as:

"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

34. Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A had this to say on the matter:

"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

35. We take the liberty to cite with approval the apposite observations and ultimately persuasive holding of Emukule, J. in *Limited & 2 others* [2005] KEHC 3224 (KLR) that the identical inherent jurisdiction vested on the High Court to transfer its own cases is discretionary in nature. The learned Judge correctly held that:

"There is no doubt that ... the Court has a wide and flexible discretion to order that a case be tried in a particular place. That discretion may however be exercised upon cause



being shown, and that cause shall have regard to the convenience of the parties, and of the witnesses, the date of when the trial shall take place, and the circumstances of the case.

In the case of *Jazira Agencies (NRB) Limited -vs- Dolphin Stationers Ltd (Supra)* P. W. Waki (as he then was) referred to Halsbury Laws of England -

“The Court’s power to transfer proceedings from one Court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the Plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings. When making or refusing an order for transfer the Court will have regard to the nature and character of the proceedings the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case.’

After discussing Hayanga's view in *Ratemo & Others* (cited in the *JAZIRA* case) that there was only one High Court in Kenya which sits in different areas as directed by the Chief Justice (as opposed to subordinate courts established under various laws) concluded that – ‘it was not forbidden for a Kenyan High Court judge sitting in location “A” to order a transmission or allocation of a case file before him to another judge sitting in location “B”. It must be a matter of discretion for the judge. I believe it must be for compelling reasons which would be for the purposes of ensuring justice and this is all within the inherent power of the Court under Section 3A of the *Civil Procedure Act*.”

36. In the same vein in *Oduor vs Plan International* [2001] K. L. R 1784 (HCK), the Plaintiff therein objected to the transfer of the suit from Nairobi to Meru on the ground that the court lacks jurisdiction to allocate work to a Court of concurrent jurisdiction. In his judgment, Visram, J. observed that:

“... Whereas there is no express provision in the *Civil Procedure Act* (Chapter 21) for transfer of cases from one High Court to another, it did not mean that, in a proper case, this Court cannot transfer a case before it to another Registry of the High Court. The fact that there is no provision on a matter cannot prevent this Court from deciding it, if by doing so, it will be able to deliver justice. In doing that the Court will employ its unlimited and inherent jurisdiction.”

37. In the present case, the application culminating in the impugned ruling sought transfer of the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ petition and, by extension, the related suits that were consolidated with that petition to the recently established ELC at Kwale in order to comply with the provisions of sections 12 and 13 of the *Civil Procedure Act*. The application was principally based on the grounds that the suit properties were situated in Kwale County; and that it would prove costly for the 1<sup>st</sup> and 2<sup>nd</sup> respondents to procure witnesses, if need be, from Kwale to Mombasa.

38. Sections 12 (a) and 13 of the *Civil Procedure Act* provide:

12. Suit to be instituted where subject matter situate Subject to the pecuniary or other limitations prescribed by any law, suits —
  - a. for the recovery of immovable property, with or without rent or profits;
  - b. for the partition of immovable property;



- c. for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;
- d. for the determination of any other right to or interest in immovable property;
- e. for compensation for wrong to immovable property;
- f. for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.

13. Suit for immovable property situate within jurisdiction of different courts

Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such court.

39. As we have already observed, the orders sought in the application were discretionary in nature because it is an undisputed fact that the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s petition and the related suits were originally properly instituted in the ELC and the High Court at Mombasa before establishment of a functional Environment and Land Court at Kwale. The principal issues to be determined were therefore whether the suit properties were actually located in Kwale County; and, if so, whether transferring the consolidated cases to the ELC at Kwale would be more convenient for the parties and more convenient for the efficient and expeditious administration of justice in the matter. We need not overemphasise the fact that the learned Judge’s decision in determination of the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ Motion was in exercise of her discretionary powers on matters of procedure to facilitate expeditious and cost-effective administration of justice without undue regard to technicalities of procedure as contemplated in Article 159(2) of the *Constitution*.

40. The instances in which such discretion would be faulted were enunciated in *Mbogo and Another v Shah* [1968] EA 93 where this Court held that:

“... it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

41. We find nothing to suggest that the learned Judge’s decision was clearly wrong because she misdirected herself; or that she acted on matters she ought not to have acted on; or otherwise failed to consider matters that she ought to have taken into consideration and that, in doing so, she arrived at the wrong conclusion.



42. Turning to the 2<sup>nd</sup> issue as to whether the appellants were denied a fair hearing and condemned unheard, it is noteworthy that in the impugned ruling, the learned Judge made reference to an affidavit by the Kwale County Surveyor to which the following documents were annexed, namely: a satellite imaging map, location plans and area survey maps from the Director of Surveys Kenya; and a topographic map of Kwale/Mombasa No. 201/1. The learned Judge found that the Kwale County Surveyor submitted that the annexed documents confirmed that the parcels MN/VI/909 and 910 are located within Kwale County. However, the affidavit and its annexures are not in the record of appeal; and they were not annexed to any of the pleadings filed by the parties in the application. It therefore cannot be established from the record whether these documents were filed within the application. In our view, the absence from the record of any particular document relied upon does not of itself suggest that a party in whose benefit the document(s) should have been availed was condemned unheard.
43. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> respondents annexed to their application a plot verification report by the District Surveyor Kwale dated 25<sup>th</sup> October 2019 with respect to parcel MN/VI/224, the subject matter of one of the related suits being Petition No. 4 of 2021 (formerly No. 202 of 2018). They also annexed a topographic map sheet No. 201/1 from the Surveyor Kinango Sub-County, Kwale confirming the administration boundary separating Kwale and Mombasa Counties and confirming that parcel MN/VI/224 is located within Kwale County. The topographic map sheet also indicates the location of parcels MN/VI/909 and 910 as being to the left of parcel MN/VI/224 and within Kwale County. The learned judge made reference to this topographic map sheet, albeit from the affidavit that is not on record as put to us.
44. In addition to the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> respondents annexed an affidavit by an officer of the DCI, who deponed that the allegations of fraud with respect to the suit properties were reported at DCI Offices at Kinango, Kwale; and an investigation report by the DCI indicating that the site of the land, which was “located in Miritini area in the boundary between Mombasa and Kwale counties”, was visited and no ongoing human activity found. Annexed to the said affidavit was a sketch map received from the Director of Surveys indicating that the physical boundaries of parcels MN/VI/909 and 910 and those of parcels MN/VI/5141, 5153 and 5154 overlapped and essentially comprised the same parcels of land on the ground.
45. It is apparent that the appellants did not directly challenge the veracity of the plot verification report and topographic map sheet in their replying affidavit and Grounds of Opposition. Instead, they annexed title documents indicating that the suit properties are situated in Mombasa District and registered in the Mombasa District Land Registry; and investigation reports by the National Land Commission and the Ministry of Lands and Physical Planning, which cast doubt as to the authenticity of the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s titles with respect to parcels MN/VI/909 and 910, a substantive challenge of proprietorship best tried and determined at the substantive hearing of the suits as consolidated.
46. When faced with the two competing sets of evidence, that of the 1<sup>st</sup> and 2<sup>nd</sup> respondents relating to the results of surveys undertaken to establish the actual position of the suit properties and that of the appellants relating to the manner of registration of the title documents for the suit properties, the learned Judge cannot be faulted for concluding that there was prima facie evidence that the subject matter of the consolidated suits were situated in Kwale County. Is this state of the affairs suggestive of condemnation without a fair hearing? We think not.
47. The appellants had the opportunity to present their case by submitting that the facts as to the actual location of the suit properties was disputed by the parties; and that in the absence of survey plans and payment receipts demonstrating payment of rates to Kwale County, it would have been prudent for



the court to call for a viva voce hearing. Indeed, the learned Judge heard them say so, but was of a different view by which the appellants were dissatisfied. To our mind, the trial court's decision on the court's jurisdiction in reliance on affidavit evidence, evidential documents, comprehensive submissions by counsel and statute law is by no means tantamount to denial of the appellants' right to a fair hearing.

48. We form this view on the authority of *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* [2020] KECA 875 (KLR) where Makhandia JA held that:

“As a general rule, there is no automatic right to an oral hearing. Procedural fairness does not require an oral hearing in all circumstances. In determining the form of a hearing, the critical question is whether meaningful participation was allowed by the process chosen by the decision-maker ....

When facts in issue in a case are strongly contested, that would be a good basis for the Court to allow viva voce evidence to enable cross-examination to separate the wheat from the chaff .... Nonetheless, as already stated, the trial court gave directions that the case proceeds by way of affidavits and written submissions and no objection was made by either party to the directions. At any rate, I think the learned judge had a discretion in the matter and it has not been demonstrated that the discretion was perversely exercised in proceeding by way of affidavit and not by oral evidence especially when the latter was not sought. I would therefore not interfere although it may be said that there was probably something to be gained through adoption of viva voce evidence.”

49. Be that as it may, it is instructive that none of the parties herein made an objection to the ELC's directions to the effect that the application would be disposed of by way of written submissions. Even though some of the documents relied on by the learned Judge appear not to be on record, the plot verification report by the District Surveyor Kwale and the topographical map sheet prepared by the Surveyor Kinango Sub-County, as annexed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' application, provided a sound basis for the learned Judge's determination in her ruling.

50. In *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* (ibid), Makhandia, JA. continued to observe:

“In summation, in the instant matter, the three appellants have not demonstrated to us any exceptional circumstance that would vitiate the directions given by the trial court to proceed by way of affidavit evidence and written submissions. The trial court gave directions on how the petition was to be heard. It exercised discretion. At no time during the proceedings did the three appellants apply for viva voce evidence to be adduced. In addition, the three appellants have not pointed to our satisfaction that issues of credibility of the deponents of the various affidavits filed in court was raised to justify receiving oral evidence to test the veracity of their depositions. I thus find that the three appellants' right to a fair hearing or right to be heard by way of viva voce evidence was not violated.

I conclude the foregoing analysis by stating that neither the urgency of a petition nor an alleged violation of a constitutional right is per se by itself a sufficient ground for a court to dispense with viva voce evidence and rely on affidavit evidence. If a party applies to court for viva voce evidence to be taken, the court ought to carefully consider the application and if persuaded to conduct the hearing by way of viva voce evidence unless for reasons to be recorded the court direct otherwise.”



51. It is common ground that the appellants filed their response to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' application vide the replying affidavit of their Director sworn on 1<sup>st</sup> November 2021 to which they annexed documentary evidence for the learned Judge's consideration. It is not in dispute that the learned Judge considered the pleadings and submissions of the parties before delivering the impugned ruling. We find nothing on the record to suggest that, after the court gave directions for disposal of the application in issue by way of submissions, the appellants made an application for a viva voce hearing, which application was not considered by the court. In the circumstances, we find that the appellants' contention that they were not accorded a fair hearing, and that they were condemned unheard, is unfounded.
52. Having carefully considered the record of appeal, the grounds on which it was anchored, the respective written and oral submissions of learned counsel for the appellants and for the respondents, the cited authorities and the law, we find that the appeal has no merit and is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Consequently, the ruling and orders of the ELC at Mombasa (N. A. Matheka, J.) dated January 19, 2021 in Petition No. 9 of 2018 be and is hereby upheld.
53. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

.....

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

