Pumwani Riyadha Mosque Committee & another v Gikomba Business Centre Limited (Civil Appeal E965 of 2024) [2025] KECA 1257 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1257 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E965 OF 2024

K M'INOTI, LA ACHODE & WK KORIR, JJA

JULY 11, 2025

BETWEEN

PUMWANI RIYADHA MOSQUE COMMITTEE ..... 1ST APPELLANT

PUMWANI RIYADHA MOSQUE REGISTERED TRUSTEES .... 2ND APPELLANT

AND

GIKOMBA BUSINESS CENTRE LIMITED ..... RESPONDENT

(An appeal against the ruling of the High Court at Nairobi (Commercial and Tax Division) (A. Mabeya, J.) dated 5th December 2024 in HCCCOMM No. E610 of 2024)

JUDGMENT

1. In this appeal, Pumwani Riyadha Mosque Committee is the 1st appellant, whereas Pumwani Riyadha Mosque Registered Trustees is the 2nd appellant. Gikomba Business Centre Ltd is the respondent. The ruling dated 5th December 2024, which is the subject of this appeal, was issued by Mabeya J. pursuant to the appellants' notice of motion dated 17th October 2024 which sought to lift orders made by the High Court on 12th October 2024 and 16th October 2024. The appellants had also sought through the motion the striking out of the respondent's plaint dated 8th October 2024. The application was premised on the grounds that the contract, which was the subject matter of the suit, contained an arbitration clause; that the High Court lacked jurisdiction to hear the matter; and that the suit was tainted by material non-disclosure. In the impugned ruling, the learned Judge, while dismissing the application on the jurisdiction of the High Court to handle the dispute, held that upon the application of the "predominant test", the dispute was a commercial one and it fell within the jurisdiction of the High Court. Regarding the question as to whether the arbitration clause in the lease ousted the jurisdiction of the High Court to hear the case, the learned Judge found the appellants had waived their right to insist on arbitration and that their argument that the High Court lacked jurisdiction therefore

failed. Finally, the learned Judge found no fault with the respondent in respect of the allegation of material non-disclosure.

2. The appellants are aggrieved by the ruling and have raised 7 grounds in their memorandum of appeal dated 11th December 2024, which we reproduce as follows:

   i. The learned Judge of the High Court erred in law in holding that he had jurisdiction to entertain the claim by the Respondent for specific performance of the lease dated 9th September, 2015 between the Respondent and the 2nd Appellant over property Land Reference Number 209/19680.

   ii. The learned Judge of the High Court erred in law by disregarding binding authority from the Supreme Court in Republic vs. Chengo & 2 Others [2017] eKLR divesting him of jurisdiction over the claim by the Respondent on the lease dated 9th September, 2015 between the Respondent and the 2nd Appellant over property Land Reference Number 209/19680.

   iii. The learned Judge of the High Court erred in law in refusing to uphold the arbitration clause in the lease dated 9th September, 2015 between the Respondent and the 2nd Appellant over property Land Reference Number 209/19680.

   iv. The learned Judge of the High Court erred in law in holding that the Appellants had taken active steps in the suit before the High Court and had thereby accepted the jurisdiction of the High Court.

   v. The learned Judge of the High Court erred in law and fact in refusing to hold that the claim before the High Court was filed and the orders made therein on 12th October, 2024 and 16th October, 2024 obtained on non-disclosure and concealment of material facts.

   vi. The learned Judge of the High Court erred in law and fact in failing to hold that the claim by the Respondent before the High Court was an abuse of the process of the Court.

   vii. The learned Judge of the High Court erred in law by disregarding the Appellants' submissions and binding authorities on the question of jurisdiction.

3. A brief background of the appeal is that through a plaint dated 8th October 2024, the respondent moved the High Court alleging breach of contract by the appellants, and mainly sought specific performance of the contract entered into by the parties. According to the plaint, the respondent entered into a lease agreement with the appellants over Land Reference No. 209/19680 (the suit property) for a of period 35 years at an agreed monthly rent of Kshs. 350,000 but the appellants breached the agreement. The lease was registered on 9th September 2015.

4. Before the case could proceed further before the High Court, the appellants filed the notice of motion, which yielded the ruling that is the subject of this appeal. In the application, the appellants contended that the lease agreement contained an arbitration clause and that the landlord-tenant dispute between the parties had been determined in favour of the 2nd appellant in BPRT/E922/2024 - Pumwani Mosque Registered Trustees vs. Gikomba Business Centre Ltd. According to the appellants, since the orders issued in BPRT/E922/2024 were never challenged, they had taken possession of the suit property and terminated the lease agreement. The appellants also challenged the jurisdiction of the High Court to hear and determine the matter, asserting that the dispute fell in the docket of the Environment and Land Court.

5. When this appeal came up for hearing before us on 24th March 2025, learned counsel Mr. Nelson Havi appeared for the appellants, whereas learned counsel Mr. Issa Mansur represented the respondent. In

addition to relying on their respective filed submissions, counsel made oral highlights at the hearing of the appeal.

6. The submissions for the appellants were dated 18th January 2025. In the submissions, Mr. Havi's argued that the High Court lacked jurisdiction to entertain the respondent's claim and the learned Judge erred in applying the "predominant test" to classify the matter as commercial, despite it being a land dispute. He asserted that jurisdiction, which is conferred by statute, cannot be expanded through judicial craft. Counsel contended that the High Court disregarded binding decisions of the Supreme Court in Republic vs. Chengo & 2 Others [2017] eKLR and Macharia & Another vs. Kenya Commercial Bank Limited [2012] eKLR on the issue of jurisdiction and embarked on judicial craft to justify jurisdiction. Counsel stressed that specialized courts exist for a purpose and that the High Court's jurisdiction is limited, particularly by Article 162(2) of *the Constitution*, which prohibits it from exercising the exclusive jurisdiction reserved for the specialized courts. Counsel maintained that the High Court had no jurisdiction over the matter in question, which was a land dispute. Urging that the learned Judge ought to have followed the decision of the Supreme Court in Republic vs. Chengo & 2 Others (supra), counsel cited Asanyo & 3 Others vs. Attorney General [2020] eKLR to submit that there is need for courts to adhere to the principle of stare decisis as this creates certainty, clarity, predictability and legitimacy within the law.

7. Turning to the other aspect of the appeal, Mr. Havi faulted the learned Judge's finding that the appellants ought to have moved the Court at the time of filing the memorandum of appearance for an order staying the proceedings and referring the dispute to arbitration. According to counsel, the arbitration clause in the lease agreement automatically ousted the jurisdiction of the High Court.

   To buttress this view, counsel relied on Dock Workers Union Limited vs. Messina Kenya Limited [2019] KECA 915 (KLR) and urged that the High Court failed to appreciate that filing a claim in court in disregard of an arbitration agreement constitutes an abuse of the process of the court and such a claim should be struck out. It was Mr. Havi's submission that the prayer by the appellants before the learned Judge was for the striking out of the suit as an abuse of court process and for non-disclosure and concealment of material facts. Counsel referred to Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 Others [2018] eKLR and Order 4, Rule 1 (f) of the Civil Procedure Rules, 2010 to urge that non-disclosure of material facts is a ground for striking out and dismissing a suit. According to counsel, although the learned Judge made a passing remark on BPRT/E922/2024, he never mentioned Nairobi MCELC No. E369 of 2024, whose withdrawal was material, and which suit had not been disclosed in the plaint. In the end, Mr. Havi urged us to allow the appeal and strike out the respondent's plaint with costs to the appellants.

8. For the respondent, Mr. Mansur, relied on submissions dated 10th March 2025, where he majorly submitted that the High Court had jurisdiction to hear and determine the suit. According to counsel, the dispute is purely commercial, stemming from a long-term lease agreement and an investor-investee relationship, rather than a landlord-tenant relationship. He supported the High Court's application of the "predominant test" to determine that it had jurisdiction. According to counsel, the primary issue in the case revolved around a breach of contract, which falls within the High Court's purview. Mr. Mansur referred to the holdings in Co- operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others [2017] KECA 79 (KLR) and Lydia Nyambura Mbugua vs. Diamond Trust Bank Kenya Limited & Another [2018] KEELC 1599 (KLR) to support the application of the "predominant test" by the learned Judge. Counsel additionally argued that the jurisdiction of the Environment and Land Court as provided under section 13 of the *Environment and Land Court Act* is limited to the "use of land" and does not include commercial aspects like mortgages, charges, collection of dues, and rents, which fall within the High Court's civil jurisdiction.

9. In reply to the appellants' contention that the decision of the learned Judge violated section 6 of the *Arbitration Act*, Mr. Mansur submitted that the High Court did not err in refusing to uphold the arbitration clause. According to counsel, it is the appellants who failed to comply with section 6(1) of the *Arbitration Act*, which required them to seek reference of the dispute to arbitration by making an application to that effect at the time of entering appearance. In this regard, counsel placed reliance on Mt. Kenya University vs. Step Up Holdfing (K) Ltd [2018] KECA 125 (KLR) to urge that the law obligated the appellant to file an application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further steps in the matter. Counsel pointed out that while the appellants, through their previous counsel, filed a notice of motion application dated 14th October 2024, they subsequently withdrew that application and filed the notice of motion that gave rise to the ruling which is the subject of this appeal. Counsel argued that the appellants participated in the proceedings without seeking the reliefs contemplated under section 6 of the *Arbitration Act* as required by the provision. He maintained that grounds 3 and 4 of the appeal lacked merit because the appellants disregarded the arbitration clause by not moving the High Court in accordance with the established procedure.

10. Rejecting the appellants' contention that the respondent's claim ought to have been dismissed for material non-disclosure, Mr. Mansur submitted that there was no material non-disclosure on the respondent's part and that the issue was properly addressed by the High Court. Counsel submitted that the existence of cases between the parties before the Business Premises Rent Tribunal and the Magistrate's Court was disclosed in the replying affidavit to the appellants' motion and that the averments were never challenged by the appellants. To that extent, reliance was placed on Daniel Kibet Mutai & 9 Others vs. Attorney General [2019] KECA 125 (KLR) for the submission that an averment not rebutted through an affidavit stands. Counsel maintained that the High Court's dismissal of the appellants' application was proper and urged us to dismiss the appeal with costs.

11. We have considered the record of appeal, the ruling by Mabeya. J., the grounds of appeal and the submissions by counsel, including the authorities cited and the applicable law. This being a first appeal, our primary role is to re-evaluate, re-assess, and re-analyze the record and then determine whether the conclusions reached by the learned Judge are to stand or fall and give reasons either way- see Abok James Odera T/A A. J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR).

12. In our view, the issues arising for determination in this appeal are:

    i. Whether the respondent's suit ought to have been dismissed for failing to disclose material facts;

    ii. Whether the arbitration clause in the parties' agreement ousted the High Court's jurisdiction; and

    iii. Whether the dispute between the parties fell within the jurisdiction of the High Court.

13. We start with the appellants' claim that the learned Judge erred by not striking the respondent's suit because it failed to disclose material facts. A perusal of the impugned ruling shows that the learned Judge addressed the issue of material non-disclosure as follows:

> "28. The issue of material nondisclosure was raised with respect to BPRT/ E922/2024. The plaintiff however, claimed that the same was stayed by the tribunal on 1/10/2024. This contention was neither refuted nor challenged

by the defendants. It therefore remains that the order in BPRT/E922/2024 remains stayed."

14. Counsel for the appellants submitted that the respondent's non- disclosure of the cases filed before the Business Premises Rent Tribunal and the Magistrate's Court ought to have led to the dismissal of the suit. The respondent's reply is that the two matters were disclosed in an affidavit sworn in response to the appellants' notice of motion. A perusal of the affidavit sworn on 28th October 2024 by the respondent's director, Bakai Maalim Kulmia in reply to the appellants' application disclosed at paragraph *11* that although the respondent had filed Nairobi MCELC No. E369 of 2024, the same had since been withdrawn after a valuation of the property showed that the Magistrate's Court had no jurisdiction. The appellants confirmed the withdrawal of the suit in their submissions. There was therefore nothing more to be addressed in respect of this particular suit by the learned Judge. With respect to the matter that was before the Business Premises Rent Tribunal, there was an averment at paragraph 9 of the respondent's stated affidavit that the proceedings had been stayed. In the circumstances, there is nothing to support the appellants' assertion that there was material non-disclosure. In any event, the two matters were not material to the suit before the learned Judge because one had been withdrawn and the other one stayed. This ground of appeal therefore fails.

15. The other two issues we have identified for determination focus on the jurisdiction of the High Court to entertain the respondent's claim. As has been held by the Supreme Court in Joho & Another vs. Shahbal & 2 Others [2014] KESC 34 (KLR) and the evergreen case of Mukisa Biscuit Manufacturing Co Ltd vs. West End Distributors [1969] EA 696, a question of jurisdiction is a pure point of law, which, if argued on its own and on the assumption that all facts as pleaded are correct, may dispose of the suit in limine. To borrow from Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR), jurisdiction is everything, without which a court has no power to make one more step and a court of law should down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

16. We will start by considering the import of the arbitration clause in the lease agreement on the respondent's suit. The appellants argued that the clause ousted the High Court's jurisdiction. The appellants also contended that theirs was a prayer for striking out the suit due to an abuse of the court process and not a stay of proceedings and referral to arbitration. The respondent, on the other hand, maintained that, as was held by the High Court, the appellants waived the arbitration clause when they entered appearance without making an application for stay of proceedings and referral of the matter to arbitration as provided by section 6 of the *Arbitration Act*. The section states that:

> " 6. Stay of legal proceedings -
>
> 1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds -
>
> a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

2. Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

3. If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

17. The manner in which section 6(1) of the *Arbitration Act* ought to be interpreted and applied has been addressed by the Court in numerous decisions. Suffice to highlight a few of the decisions. In Niazsons (K) Ltd vs. China Road & Bridge Corporation Kenya [2001] KECA 376 (KLR) the Court pointed out that:

> " Whether or not an arbitration clause or agreement is valid is a matter the Court seized of a suit in which a stay is sought is duty bound to decide. The aforequoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the Court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred."

18. Similarly, in Corporate Insurance Company vs. Loise Wanjiru Wachira [1996] KECA 70 (KLR) the Court held that:

> "While we agree with the proposition that a Scott v Avery arbitration clause can provide a defence to a claim, we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.
>
> The procedure in England in relation to these clauses is summarised at page 165 in The Law and Practice of Commercial Arbitration in England by Mustill and Boyd (2nd Ed.) as follows:
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> "A Scott v Avery clause performs two different functions. Firstly, it creates an obligation to arbitrate: and as such, it gives the defendant in a High Court action the right for a stay of the proceedings. Second, it creates a condition precedent to the plaintiff's right of action; and as such, it gives the defendant a substantive defence to the claim. A defendant sued in breach of a Scott v Avery provision thus has a choice of remedies. In law, he is entitled to bide his time and rely on the Scott v Avery point at the trial. But the court does not approve of this procedure, because it wastes the costs of the action. The right course is for him to apply for a stay." (underling ours).

19. While the foregoing two decisions predate the amendment to section 6 of the *Arbitration Act* through *Act No. 11 of 2009*, which introduced the mandatory requirement for an application for stay pending

arbitration, the legal jurisprudence surrounding the procedure remains the same. Thus, in Adrec Limited vs. Nation Media Group Limited [2017] KECA 106 (KLR), the Court reiterated that:

> "Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates filed on its behalf and prior thereto or contemporaneously with such of the notice of appointment or entering of appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6(1) of the *Arbitration Act*. It should be emphasized that the right to seek and obtain stay of proceedings under section 6(1) of the *Arbitration Act* is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position."

20. From the foregoing, it is clear that the suit by the respondent could not be termed an abuse of the court process merely because there existed an arbitration clause. In our view, and as was held in Corporate Insurance Company vs. Loise Wanjiru Wachira (supra), once the suit was filed, the only remedy available to the appellant was to seek a stay of proceedings and reference to arbitration.

21. Counsel for the appellant referred us to Dock Workers Union Limited vs. Messina Kenya Limited (supra) in support of his argument that the trial court ought to have referred the dispute between the parties to arbitration. Specifically cited was the statement by the Court that:

> " 8. ... The parties entered into the said agreement freely and opted to oust other means of dispute resolution mechanisms other than arbitration. They cannot turn around and denounce the arbitration agreement. It is also worth of note that *the Constitution* of Kenya itself has given prominence to arbitration by acknowledging it as one of the alternative modes of dispute resolution that courts should encourage."

22. We have read the cited decision, and with respect to counsel, we find that the quoted statement of the Court is not relevant to the issue before us. In Dock Workers Union Limited vs. Messina Kenya Limited (supra), the Court was faced with the question as to whether the appellant therein could avoid arbitration despite the existence of an arbitration clause in the contract between it and the respondent. The Court agreed with the learned Judge that it could not. The application of section 6(1) of the *Arbitration Act* never featured anyway in that appeal. That case is therefore distinguishable from the appeal before us. As such, we cannot fault the learned Judge for holding that:

> " 27. The failure to seek a stay of proceedings and for reference at the appropriate time, coupled with the defendants' active participation in the current proceedings, means that the defendants have waived their right to insist on arbitration at this stage. The contention that the Court lacks jurisdiction therefore, fails."

23. With the regard to the appellants' plea that the suit was an abuse of the court process, we refer to the Supreme Court's holding in Commission of Jurists & Another vs. Attorney General & 5 others [2012] KESC 4 (KLR) that:

> " 36. The concept of "abuse of the process of the Court" bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with

a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice.

37. The bottom line in a case of abuse of Court process is that, it "appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption..." [D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 –per Madan, JA at p.9]. Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process."

24. On the basis of our analysis, we do not perceive a tell-tale case of abuse of court process as it has not been established that the respondent was attempting to manoeuvre the court's jurisdiction in a manner incompatible with the goals of justice. Therefore, we cannot fault the learned Judge for finding that the suit was not an abuse of the court process because the respondent had not pursued arbitration before filing the suit. Similarly, flowing from the cited authorities, we find no error in the holding by the learned Judge that the existence of an arbitration clause in the lease agreement did not oust the jurisdiction of the High Court. A party desirous of activating an arbitration clause where a suit has been filed in court is duty- bound to activate section 6(1) of the *Arbitration Act*. That is the only way the court can know about the existence of the arbitration clause. We thus find no merit in the appeal with respect to the assertion that the respondent's case ought to have been dismissed for being an abuse of the court process.

25. In addressing the second limb of the challenge to the High Court's jurisdiction, the learned Judge referred to Article 162 of *the Constitution* and section 13 of the *Environment and Land Court Act* and held that:

"18. In the present case, I have perused the plaint dated 8/10/2024 and on a careful review thereof, it is clear that the plaintiff's gravamen concerns a breach of contract. Specifically, from paragraphs 3 to 11 of the plaint sets out the cause of action, which is breach of contract and not otherwise. In any event, the prayers themselves are apt as to what the suit is all about.

19. The suit before Court concerns the Lease by the defendants given to the plaintiff for the construction of Gikomba Business Center, which is a commercial venture. It is alleged that the defendants are in breach of that Lease and this suit is all about that. In applying the predominant test, the matter involves commercial interests and therefore, it is within the purview of the High Court jurisdiction. Accordingly, the matter is in the correct forum."

26. The intertwining jurisdiction between the High Court under Article 165 of *the Constitution* and the specialized courts under Article 162 of *the Constitution* remains a live controversy within our jurisprudential sphere. The Supreme Court in Republic vs. Chengo & 2 Others (supra) addressed the jurisdiction exercised by judges of the specialized courts vis-à-vis that exercised by those of the High Court and held that:

"It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by

and flows from article 165(5) of *the Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters "reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in article 162(2)"."

27. In Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others (supra), the question of the competing jurisdiction between the High Court and the Environment and Land Court arose, and the Court (differently constituted) held that:

> " 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....
>
> By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.
>
> 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..."

28. At this juncture, perhaps it is imperative to point out that we do not agree with the submission by counsel for the appellants that the learned Judge disregarded the doctrine of stare decisis by invoking the "predominant test" in determining the question of jurisdiction. Firstly, whereas the Supreme Court judgment in Republic vs. Chengo (supra) was delivered on 26th May 2017, this Court's judgment in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna (supra) was delivered on 12th October 2017. Secondly, this Court's judgment in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna (supra) was more specific to the competing jurisdiction of the Environment and Land Court vis-à-vis that of the High Court, while the judgment in Republic vs. Chengo (supra) generally addressed the question as to whether a Judge in one of the three courts (High Court; Environment and Land Court; or Employment and Labour Relations Court) had jurisdiction to deal with matters outside the court to which he/she was appointed. It is also important to note that Republic vs. Chengo (supra) arose from a criminal appeal in which one of the two judges of the bench that handled the appeal at the High Court was from the Environment and Land Court. The Supreme Court in Republic vs. Chengo (supra) never went into the specifics of the jurisdiction of the Environment and Land Court. In the circumstances, and considering the issue that was at hand was whether the dispute fell within the jurisdiction of the High Court or the Environment and Land Court, it cannot be said there was stare decisis on the issue arising from Republic vs. Chengo (supra), which the learned Judge ignored.

29. Although counsel for the appellants appeared to suggest that the learned Judge erred in using the "predominant test" principle to determine that he had jurisdiction to deal with the dispute between

the parties, we find counsel's submission to be without merit for it was in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna (supra) that the Court applied the principle of the "dominant issue" to aid judges of the High Court and the specialized courts in determining whether a matter fell within a particular court's jurisdiction or that of any of the other courts of equal jurisdiction. The "dominant issue" principle or the "predominant test" principle as referred to by the learned Judge is therefore a recognized principle and the learned Judge cannot be faulted for invoking it.

30. Concerning the dispute at hand, it is imperative to appreciate that Article 162(2)(b) of *the Constitution* provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to, land. Section 13(1)&(2) of the *Environment and Land Court Act* specifically provides the jurisdiction of that court, which is known as the Environment and Land Court, as follows:

> " 13.
>
> (1) The Court 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.
>
> 2. In exercise of its jurisdiction under Article 162
>
> (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes:
>
> a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
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> b. relating to compulsory acquisition of land;
>
> c. relating to land administration and management;
>
> d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> e. any other dispute relating to environment and land."

31. There is no doubt that the jurisdiction of the Environment and Land Court entails disputes related to land use planning and tenure. In the present case, the contention between the parties is whether the lease agreement between them amounted to the "use of land" or was a breach of contract falling within what was described by the Court in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna (supra) as "the tabulation of the sums owing".

32. According to the Sessional Paper No. 1 of 2017 on National Land Use Policy, land use is defined as follows:

> "Land use refers to the activities to which land is subjected to and is often determined by; economic returns, socio-cultural practices, ecological zones and public policies. In the context of this policy, land use is defined as the economic and cultural activities practiced on the land...
>
> Key land uses in Kenya include; agriculture, industrial/ commercial use, infrastructure, human settlements, recreational areas, rangelands, fishing, mining, wildlife, forests, national reserves and cultural sites; among others spread across the high, medium and low rainfall areas." (Emphasis ours)

33. According to the United Nations Department of Economic and Social Affairs (https://tinyurl.com/43sdev5b), land use is defined as:

> " Land use defined in this way establishes a direct link between land cover and the actions of people in their environment. Thus, a land use can be defined as a series of activities undertaken to produce one or more goods or services." (Emphasis ours)

34. The definition of land use was given judicial footing in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna (supra) thus:

> " 35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the cujus doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.
>
> ...
>
> 37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be 'using' his land simply by virtue of having a floating charge/ disposition over the property."

35. In essence, land use can simply be defined as activities practised on land to yield economic or social benefits. Additionally, it is important to appreciate that among the powers donated by section 13(2)

(a) of the *Environment and Land Court Act* to the Environment and Land Court is the authority to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.

36. Having established the foregoing, a review of the plaint and the lease agreement will determine whether the dispute fell within the provisions of section 13 of the *Environment and Land Court Act* or otherwise. Through the agreement in question, the respondent leased the suit property from the appellants for economic activities and agreed to pay the appellants a monthly rent in consideration of occupation and use of the suit premises. From the plaint, some of the alleged particulars of breach are "interfering with the business operations of the respondent and violation of the terms of the lease agreement." Additionally, one need not look further than Part 1 of the lease agreement and paragraphs 6-11 of the plaint to conclude that the lease agreement concerned the use of the suit property and the respondent's tenure thereon. Unlike in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna (supra), where the land was being used like a chattel to secure a loan from a bank, in the instant matter, the respondent had leased the land and put up structures thereon for leasing out. The land was therefore being used in the terms contemplated by Article 162(2)(b) of *the Constitution*, and the dispute arising from the lease agreement between the parties squarely fell in the province of the Environment and Land Court. That being the case, we must respectfully disagree with the learned Judge's finding on jurisdiction. In our view, the dispute herein is one which fell within the jurisdiction of the Environment and Land Court pursuant to the provisions of Article 162(2)(b) of *the Constitution* and section 13(2)(a) of the *Environment and Land Court Act*.

37. Flowing from the foregoing, this appeal succeeds. Although we have not found in favour of the appellants in regard to all the other issues, the ruling by Mabeya, J. is for setting aside on the ground that he had no jurisdiction to hear and determine the dispute between the parties because it fell in the jurisdiction of the Environment and Land Court and not the High Court. Consequently, the ruling dated 5th December 2024 is hereby set aside and the respondent's plaint dated 8th October 2024 is struck out with costs to the appellants.

38. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY, 2025.

K. M'INOTI

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. JUDGE OF APPEAL

K. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.