



**Bayusuf v Mbesa Investments Limited & 2 others (Civil Appeal
64 of 2020) [2022] KECA 774 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KECA 774 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 64 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JUNE 10, 2022**

BETWEEN

FAHAD IQBAL AHMED BAYUSUF APPELLANT

AND

MBESA INVESTMENTS LIMITED 1ST RESPONDENT

MUSLIMS FOR HUMAN RIGHTS 2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT

*(An appeal from the Ruling of the Constitutional & Judicial Review
Division of the High Court of Kenya at Mombasa (Ogola, J.) delivered
on 10th December 2020 in Constitutional Petition No. 43 of 2020)*

JUDGMENT

1. In this appeal, the appellant, Fahad Iqbal Ahmed Bayusuf (Bayusuf), is challenging a ruling delivered on 10th December 2020 by which the High Court at Mombasa (Ogola, J.) held that it has jurisdiction to entertain a petition by the 1st respondent, Mbesa Investments Limited (Mbesa Investments), seeking declarations that the 3rd respondent, The County Government of Mombasa (the County Government), violated Mbesa investments' rights under Article 47 of the *Constitution* of Kenya, 2010 by issuing it with an enforcement notice to stop approved development of a Two 10 storey building on its beachfront properties in Mombasa, LR No.'s MN/I/3412, 5503 and 5504 (the Project). In the result, the High Court dismissed a preliminary objection on jurisdiction in which the County Government contended that jurisdiction in the matter vested exclusively in the Environment and Land Court (ELC).
2. The background in brief is that Mbesa Investments obtained approvals for the Project from the County Government including change of use which was granted on 25th September 2015. On 14th



April 2020 the National Environment Management Authority (NEMA) granted it a license for the project and thereafter Mbesa Investments moved to site to commence construction.

3. On 24th June 2020 the County Government served Mbesa Investments with an “Enforcement Notice” in the following terms:

“RE: NOTICE TO STOP DEVELOPMENT ON PLOT 5503, 5504, AND 3412 NELLY OFF LINKS ROAD.

You are partial approval Ref: No. P/2019/712 on the above land refers.

The development on described above has been carried out without following the conditions of approval and due to the same, members of the neighbourhood have petitioned the County Government of Mombasa to stop the development pending resolving the outstanding matter.

Your approval Ref: No. CP/AAA/2628 stands suspended until further notice.

Take note and

1. immediately stop and desist from carrying out any works and remove laborers on site
2. Immediately restore the land to its original shape and level Failure to which the enforcement officers shall move in and execute such requirements without further reference to you at your own cost which may be recovered as a civil debt in any court of competent jurisdiction for the related expenses incurred.

Dr. J. J. Mwajuma

Chief Officer, Lands Planning and Housing Mombasa.”

4. Following receipt of that notice, Mbesa Investments, through its advocates letter dated 25th June 2020 demanded the lifting of the unlawful suspension of development. Thereafter, by a petition dated 1st July 2020 filed before the High Court on 2nd July 2020, Mbesa Investments averred that having obtained the necessary licenses and approvals to commence construction of the project, the County Government wrongly “slapped” it with the said notice; that it had incurred substantial loss and that “unless construction commences forthwith there is a real risk that the project will collapse with various strategic investors pulling out with even greater losses”; that having already approved the building plans, the County Government “has no lawful authority to suspend the approval after the fact”; that the County Government failed to give valid reasons or explanation for the suspension; that under Article 47 of the *Constitution*, every person has the right to administrative action that is expeditious, efficient, lawful and reasonable; and that the County Government thereby violated Article 27 of the *Constitution* and the *Fair Administrative Action Act* as well as Section 72 of the *Physical and Land Use Planning Act*.
5. Mbesa Investments pleaded further that it relied and acted upon the said approvals and licenses; and that it had a legitimate expectation that the County Government would not illegally suspend or interfere with the project. As for reliefs, Mbesa Investments prayed under Articles 22 and 23 of *the Constitution*, and Section 11 of the *Fair Administrative Action Act*, 2015 for: a declaration the County Government violated its rights under Article 47 of the *Constitution*; a declaration that the suspension of the Project vide letter dated 24th June 2020 by the Chief Officer is null in void. Alongside the petition, Mbesa Investments made an application for a conservatory order to stay the enforcement and implementation of the Enforcement Notice.



6. Following an application dated 10th July 2020, Bayusuf (the appellant) was joined in the petition as an interested party in a ruling delivered on 5th October 2020. Meanwhile, the County Government had on 13th July 2020 filed a notice of preliminary objection praying for dismissal of the petition on the grounds that: the High Court lacked jurisdiction to entertain it by dint of Article 162(2)(b) of the *Constitution* and Section 13 of *Environment and Land Court Act*; that jurisdiction pertaining to land use is vested in the Environment and Land Court (ELC); that the petition offends Sections 72(3) and 78 of the *Physical and Land Use Planning Act* which provides the avenue for Mbesa Investments redress; that the Advocates acting for Mbesa Investments did not have authority to do so; that the petition was a fishing expedition as there were other suits before the ELC touching on the same subject matter, namely ELC No. 70 of 2020 between Fahad Igbal Ahmed Bayusuf vs. Mbesa Investments Limited & 2 others; ELC Constitution Petition No. 16 of 2020 between Lydia Kaguna Japeth & 2 others vs. Mbesa Investments Limited & 2 others.
7. Bayusuf supported the preliminary objection and submitted further that Mbesa Investments remedy lay in appealing the decision of the County Executive Committee Member to the County Physical Land Use and Planning Liaison Committee which was enjoined to determine such appeal within 30 days and thereafter, by reason of Section 93 of the Act, recourse to the ELC would be by way of appeal.
8. Having heard and considered the rival arguments on the preliminary objection, the learned Judge, in dismissing it, concluded that the dispute the subject of the petition “does not relate to the issues set out” in Section 13 of the ELC Act.
9. Aggrieved, the appellant lodged the present appeal. Urging the appeal before us, learned counsel for the appellant Mr. Paul Buti submitted that Article 165(5)(b) of the *Constitution* provides that, “the High Court shall not have jurisdiction” in respect of matters falling within the jurisdiction of courts of equal status; that the present matter relates to the development of land and the High Court should therefore not continue to entertain it; that the Judge erred in holding that there was “abundance of jurisdiction” or overlapping jurisdiction between the High Court and the ELC and failed to appreciate that Article 165(5)(b) of *the Constitution* is mandatory in its terms.
10. Counsel submitted further that under Section 93 of the *Physical and Land Use Planning Act*, disputes thereunder should be heard by the ELC; that the High Court has no jurisdiction over the same; and that the continued entertainment of the matter before the High Court is a contravention of Constitution. It was urged that there was no complaint in the petition relating to alleged violation of Mbesa Investments socio and economic rights and reference to these amounts to re-writing the petition. Counsel stressed that Article 165(5) of the *Constitution* does not permit the High Court to entertain a land use matter such as this.
11. Supporting the appeal, learned counsel Mr. Murtaza Tajibhai for the County Government (the 3rd respondent) submitted that it is evident from the title of petition itself that it relates to the matter of “Physical & Land Use Planning Act 2019”; and that the dispute relates to an enforcement notice in relation to land development which is a matter within the exclusive jurisdiction of the ELC. In that regard, reference was made to the case of *Director of Planning & Architecture, County Government of Mombasa vs. Makupa Transit Shade Limited* [2019] eKLR. It was submitted that the question of socio-economic rights alluded to by the High Court does not arise from the petition.
12. Learned counsel Mr. Mohamed Ali appearing with learned counsel Mr. Mohamed Balala for Mbesa Investments (the 1st respondent) in opposing the appeal submitted that the principle of exhaustion of alternative remedies can only apply if the alternative remedy is suitable or available; that in the present



case, the Committee is not in existence in Mombasa and the alternative remedy is therefore neither suitable nor available.

13. On jurisdiction, it was submitted that what Mbesa Investments as petitioner is seeking before the High Court is protection of its constitutional rights; that its petition is concerned solely with infringement of constitutional rights on account of the failure by the County Government to abide by Article 47 of the *Constitution*; that under Article 23 of the *Constitution*, the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
14. It was submitted that the High Court correctly determined in the impugned ruling that socio-economic rights are involved, the determination of which is outside the mandate of the ELC; and that the ELC does not have power on protection of fundamental rights. It was submitted that a problem would only arise if there was a mix of issues, but in this case the petition is restricted to protection of rights under Article 47 of the *Constitution*, which according to counsel is a preserve of the High Court.
15. Counsel referred to the High Court case of *Mohamed Ali Baadi and others vs. Attorney General and 11 others* [2018] eKLR for the holding that the High Court and ELC have concurrent jurisdiction and could determine constitutional matters when raised and that declining jurisdiction would amount to abdicating from its constitutional mandate. Reference was also made to the Supreme Court decision in the case of *Mitu-Bell Welfare Society vs. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR for the argument that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.
16. It was urged that the sole issue before the High Court is whether, as commanded by Article 47 of the *Constitution*, the County Government accorded Mbesa Investments, a fair hearing prior to stoppage of construction works.
17. Learned counsel Mr. Willis Otieno for Muslim for Human Rights (the 2nd respondent) in opposing the appeal submitted that the ELC does not have exclusive jurisdiction in this matter; that what is in issue is the suspension of works and the mandate of the County Government to issue such suspension orders; that the development approval given for the project is not being challenged and the Committee under the Physical Planning and Land Use Act has no mandate to deal with suspension of works; that as the development approval is not challenged, there is no basis for referring the matter to the ELC; that the concern in the petition before the High Court is the infringement of myriad rights which under Article 165(3)(b) of the *Constitution* can only be litigated before the High Court;
18. We have considered the appeal and the submissions. The question for determination is whether the learned Judge erred in dismissing the preliminary objection on jurisdiction by holding that the High Court has jurisdiction over the matter the subject of the petition. In asserting jurisdiction over the matter, the learned Judge expressed that the subject of the petition:

“...is purely a dispute where it is alleged that the respondent has acted in excess of its powers and violated the right to fair administrative action to suspend works at a construction site and direct labourers to leave site. It is a violation of rights and freedoms of the individual that has been affected and is being litigated.”
19. The Judge expressed that the other issues raised in the preliminary objection could not be determined on preliminary basis as to do so would “amount to determining the main application and the petition.”



20. In rejecting the contention that the ELC was the proper forum for adjudication of the matters the subject of the petition as it was already seized of other suits arising from the same subject matter, the Judge was of the view that the orders sought in the suits before ELC are distinct, as they are injunctive orders stopping construction in the suit property for among other reasons that “approvals given should be cancelled” and proximity of the suit properties to the other properties; and that the orders sought before the ELC can be fully granted or denied without affecting the issue for determination in the petition before the High Court in which, in his view, the “there is a single issue as to the constitutional validity of the Enforcement Notice issued” by the County Government.
21. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR the Supreme Court of Kenya pronounced that:
- “A Court’s jurisdiction flows from either Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
22. The Supreme Court was categorical that without jurisdiction, a court cannot entertain any proceedings. Earlier *In the Matter of Interim Independent Electoral Commissions*, Constitutional Application No. 2 of 2011 [2011] eKLR, the Supreme Court had similarly expressed that: where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits; it cannot expand its jurisdiction through judicial craft or innovation; nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.
23. With the foregoing in mind, the jurisdiction of the High Court as set out in Article 165(3) of the Constitution includes:
- “3) Subject to clause (5), the High Court shall have —
- a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. ...
 - d. ...
 - e.
 4.
 5. Under Article 165(5) of the Constitution:
“The High Court shall not have jurisdiction in respect of matters-
 - a. 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).
[Emphasis added]
- (6)”



24. Article 162(2) of the *Constitution* empowers Parliament to “establish Courts with the status of the High Court to hear and determine disputes relating to:
- a. employment and labour relations; and
 - b. the environment and the use and occupation of, and title to, land.
25. Under Article 162 (3), Parliament is mandated to determine the jurisdiction and functions of the employment and labour relations (ELRC) and of the ELC pursuant to which the *Environment and Land Court Act*, Chapter 12 (ELC Act) was enacted. Section 13 of the ELC Act provides as follows:
- “(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 written law 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 relating to environment and land, including disputes-
 - a. relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
 3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution . [Emphasis]
 - (4)
26. The Supreme Court in *Albert Chaurembo Mumba & 7 others vs. Maurice Munyao & 148 others* [2019] eKLR stated that the language in Article 165(5) of *the Constitution* is instructive and that:
- “[130] It is clear to us that Article 165(5) of *the Constitution* ousts certain questions from the jurisdiction of the High Court on matters of employment and labour relations, and matters of environment, use, occupation and title to land by providing thus:
 - “(5) The High Court shall not have jurisdiction in respect of matters— (a) 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).”



(131) The clear wording of the debarment of the High Court by the Constitution is that “shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts under Article 162(2)”

27. Distinguishing the jurisdiction of the High Court and the specialized courts established under Article 162(2)(3) the Supreme Court, in the case of *Republic v Karisa Chengo & 2 others* SC Petition No. 5 of 2015 [2017] eKLR stated thus:

“...Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts.

(51) Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions.”

And later in the same case, the Supreme Court stated:

“...pursuant to Article 162(3) of Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

28. The Supreme Court expressed further that, “to give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute.” What then is the nature of dispute the subject of the petition by Mbesa Investments before the High Court? The title of the petition bears reference to: the matter of “alleged contravention of rights of fundamental freedoms under Article 47 of the *Constitution* of Kenya, 2010”; and “the County Government Act 2012”; and the “Physical & Land Use Planning Act, 2019”; and to “the *Fair Administrative Action Act*, 2015”. Under the “facts of the case” in the body of the petition and in the supporting affidavit sworn by its Managing Director, Mbesa Investments avers, as already stated, that it acquired the properties for purposes of development of the Project; obtained all requisite approvals and licenses; applied for change of user with respect to the project; sought and obtained comments from the District Physical Planner, District Surveyor and District Land Officer all of whom expressed no objections to the application for change of user; notified the public of the intended change of user by advertisement in the press; following which the County Government granted approval for change of user subject to certain conditions on 25th September 2015; applied and obtained NEMA impact assessment license for the project on 14th April 2020; had building plans approved before commencing construction works on 26th June 2020 when it was “slapped with a notice” by the County Government “to stop and or suspend” the project pending resolution of outstanding matters purportedly raised in a petition from neighbours.



29. Based on those pleaded facts, Mbesa Investments contended that its rights to fair administrative action under Article 47 of the Constitution were violated; that having approved the project, the County Government had no lawful authority to suspend the approval; that the County Government gave no valid reasons or explanation for suspending the project; and that the County Government violated Section 72 of the Physical and Land Use Planning Act under which Mbesa Investments “is also entitled to be given an opportunity to be heard before any adverse action is taken to suspend the project.” The reliefs sought, under Articles 22 and 23 of the Constitution and Section 11 of the Fair Administrative Action Act, 2015 are a declaration that the County Government thereby violated its rights under Article 47 of the Constitution and a declaration that the suspension of the project is null and void.
30. Although, on the face of the petition, the High Court is called upon to determine whether the County Government violated Mbesa Investments constitutional and statutory right to fair administrative action, a matter within the jurisdiction of the High Court under Article 165(3)(b) of the Constitution, it is invited to do so in the context of a matter relating to planning, use, regulation and development of land under the Physical & Land Use Planning Act, 2019. The averments in the petition and the supporting affidavit shows that the dispute is essentially one of land development and concerns the alleged violation of constitutional rights and fundamental freedom on account of the alleged irregular suspension of the project.
31. As already indicated, under Section 13 of the ELC Act, the jurisdiction of ELC on matters relating to environment and land extends to determination of disputes relating to land use planning, land administration and management and “any other dispute relating to environment and land.” Section 13(3) of the ELC Act then stipulates that:
- “(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.”
32. Authorities abound that courts of equal status, of which the ELC is one, have jurisdiction and are the correct forum to adjudicate disputes involving alleged violations of constitutional rights in their spheres of specialty. For instance, in Kisauni Bridge Limited vs. Kenya Urban Roads Authority & another [2019] eKLR this Court stated:
- “Article 165(5) of the Constitution precludes the High Court from entertaining matters that are exclusively reserved for the Environment and Land Court as well as the Employment and Labour Relations Court. Whereas, on the face of it, the appellant’s petition raised issues that fall within the jurisdiction of the High Court, at the core of the dispute is the question of occupation and title to the suit properties. The respondents’ cross-petition alleged that the appellant illegally acquired ownership of the suit properties. This is an issue that falls squarely within the constitutional and statutory jurisdiction of the Environment and Land Court. Whatever constitutional questions that may arise in the dispute can be handled by that court.”
33. In Nellie Wanjala Opembe vs. Fibi Usita Aura & another [2016] eKLR this Court expressed:
- “This Court has pronounced itself in similar instances, on the question of whether the Employment and Labour Court has jurisdiction to consider constitutional issues. In the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board



& 6 others [2015] eKLR it was posited that the Constitution does not establish a stand-alone constitutional court with exclusive jurisdiction to adjudicate upon constitutional issues.”

34. Similarly, in the case of *Prof. Daniel N. Mugendi v. Kenyatta University & Others* [2013] eKLR, which was concerned with the question of whether or not the Industrial Court had jurisdiction to determine issues concerned with the of violation of constitutional rights, this Court stated:

“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”

35. We echo the words of Okwengu, JA (with necessary modification to refer to the ELC) in the case of *Judicial Service Commission vs. Gladys Boss Shollei & another* [2014] eKLR, where she stated:

“In my view to hold that the Industrial Court [read ELC] has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship [read ‘land development matter’] would defeat the intention and spirit of the Constitution in establishing special courts to deal with employment and labour disputes. Indeed such a stance would not only be inimical to justice, but would expressly contravene Article 20 of the Constitution that provides that the Bill of Rights “applies to all law and binds all state organs and persons”, and enjoins a court to promote the spirit, purport and objects of the Bill of rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom.”

36. In the same context, see also: *County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others* [2015] eKLR ; *Kenya Tea Growers Association & another vs. Kenya Plantation & Agricultural Workers Union* [2018] eKLR ; and also *Public Service Commission & 4 others vs. Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (consolidated) [2022] KECA15 (KLR) (8th February 2022)(Judgment).

37. We think the learned Judge of the High Court fell into error in seeking to sever and isolate the constitutional infringement dimension of the case from its context, particularly in view of the fact that it has been demonstrated that the ELC was seized of disputes arising from the same subject matter. In that regard, the Judge stated:

“There is no doubt in my mind that there will be occasional situations where the High Court and the Environment and Land Court, and indeed other sister courts could have concurrent jurisdiction on a particular issue. However, there will always be one court which, on a particular issue before the court, has more abundant jurisdiction. More so, in my view, if the issue herein arose before proceedings in an ELC case, that court would be able and indeed should deal and determine the constitutional issue within the proceedings. But if the constitutional issue is the sole basis for commencement of proceedings, and if it is an isolated issue which can be determined in isolation, then the High Court must be allowed to proceed and entertain the matter.”

38. The Judge, in our view, therefore erred in concluding that the petition “is purely a dispute where it is alleged that the respondent has acted in excess of its powers and violated the right to fair administrative



action to suspend works at a construction site and direct labourers to leave site. It is a violation of rights and freedoms of the individual that has been affected and is being litigated.”

39. Moreover, the finding by the Judge that the dispute was concerned with violation socio-economic rights under Article 43 of the *Constitution* has no foundation in the petition. The Judge also introduced a novel concept of “more abundant jurisdiction”. In *Albert Chaurembo Mumba & 7 others vs. Maurice Munyao & 148 others* (above) the Supreme Court of Kenya cautioned:

“What is emerging from the above observations is a situation where disputing parties have options to choose the forum to approach in the quest for justice which in our view is an injustice in itself and a mortification of our judiciary and the jurisdictional competence set by the Constitution in our judicial hierarchy. Such bridled state of events leaves the powers of the courts to the whims of judicial forum seeking litigants who practise before our courts to decide and choose at their own will the fora for dispute resolution in total disregard to the jurisdictional limits set out in the Constitution. It portends an imitable case of judicial forum shopping and an abuse of the court process.”

40. In conclusion therefore, we are persuaded that the preliminary objection on jurisdiction by the County Government as supported by Bayusuf, the appellant, was merited and the learned Judge erred in dismissing it. Consequently, we allow the appeal and set aside the ruling and orders of the High Court given on 10th December 2020. We substitute therefor an order upholding item 1 of the notice of preliminary objection dated 13th July 2020 to the effect that the petition is inconsistent with Article 162(2)(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act* and the High Court lacks jurisdiction to entertain the petition. Whereas we were minded to order the matter to be transferred to the ELC in lieu of the order to strike out the petition, we are unable to do so in view of the Supreme Court affirmation in the case of *Albert Chaurembo Mumba & 7 others vs. Maurice Munyao & 148 others* (above) of the principle in *Kagenyi vs. Musiramo & another* [1968] EALR 43 that an order for transfer from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction. Consequently, the petition before the High Court is hereby struck out.

41. The appellant will have the costs of the appeal and of the High Court.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JUNE 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of original.



Signed

DEPUTY REGISTRAR

