



**Ayora v Directorate of Criminal Investigations & another; Odhiambo (Interested Party)
(Petition E029 of 2023) [2024] KEELC 7391 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
PETITION E029 OF 2023
JO MBOYA, J
OCTOBER 22, 2024**

BETWEEN

ALFRED JUMA AYORA PETITIONER

AND

DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

AND

TERESIA ADHIAMBO ODHIAMBO INTERESTED PARTY

JUDGMENT

Introduction and Background

1. The Petitioner herein has approached the court vide Petition dated the 19th June 2023 and which is supported by an affidavit sworn by the Petitioner [namely, the Deponent] on even date. For coherence, the Petitioner seeks for the following reliefs;
 - i. A declaration that Articles 10, 47(1) and (2). 50(1) and 232 (1) (c). (e) and (f) of the Constitution enjoins the 1st Respondent to comply and undertake investigations in a manner that complies with all court orders including the order issued on 17th April, 2023 in Nairobi ELC Case No.E012 OF 2023(OS)-Alfred Juma Ayora versus Teresiah Adhiambo Odhiambo & Chief Land Registrar.
 - ii. A declaration that the arrest, detention and prosecution and or intended prosecution of the Petitioner's agents namely Leanford Shihachi and Harrison Muyela in relation to their occupation of the parcel of land namely Nairobi/Block 99/142 is an abuse of court process and a violation of Articles 10.47(1) and 232 of the Constitution and therefore illegal, null and



void given the order issued on 17th April, 2023 in Nairobi ELC Case No.E012 OF 2023 (OS)- Alfred Juma Ayora versus Teresiah Adhiambo Odhiambo & Chief Land Registrar.

- iii. A declaration that the investigations, arrest and or intended prosecution and or ongoing prosecution of the Petitioner and any of his agents and or licensees in relation to his possession and occupation of the parcel of land namely Nairobi/Block 99/142 is an abuse of power and discretion, is aimed at achieving an ulterior or improper motive and is thus in gross contravention of the Constitution and the law.
 - iv. An order for judicial review by way of certiorari to remove into the Court any investigation of the 1st Respondent and decision of the 2nd Respondent to institute and continue any prosecution of the Petitioner and his agents including Leanford Shihachi and Harrison Muyela that is anchored on their possession of the parcel of land known as Nairobi /Block 99/142.
 - v. A declaration that the Respondents have violated the rights of the Petitioner and his agents namely Leanford Shihachi and Harrison Muyela in effecting their arrest on 16th June, 2023 at 7 pm contrary to the orders issued by the Court on order issued on 17th April, 2023 in Nairobi ELC Case No. E012 OF 2023 (OS)-Alfred Juma Ayora versus Teresiah Adhiambo Odhiambo & Chief Land Registrar
 - vi. A declaration that Leanford Shihachi and Harrison Muyela are entitled to compensation of Kshs. 25,000,000.00 each as damages for their illegal and unlawful arrest and detention.
 - vii. A declaration that in arresting Leanford Shihachi and Harrison Muyela despite knowledge of the order issued on 17th April, 2023 in Nairobi ELC Case No. E012 OF 2023 (OS)-Alfred Juma Ayora versus Teresiah Adhiambo Odhiambo & Chief Land Registrar, officers of the 1st Respondent namely Polycarp Magai, Desterio Omukanga and Joshua Oburu have violated the national values of integrity, good governance, transparency, professionalism and accountability under Articles 10 and 232 of the Constitution and are unfit to hold office in the National Police Service or any other public office in the Republic of Kenya.
 - viii. Any further order or relief that this court deems fit to make to meet the interests of justice.
 - ix. The costs of this Petition be awarded to the Petitioner
2. The Petition is anchored on various grounds that have been enumerated in the body thereof. Furthermore, the Petition is supported by the affidavit sworn by the Petitioner [deponent] on the 19th June 2023 and a supplementary affidavit sworn on 26th February 2024. Suffice it to underscore, that the Petitioner has also attached various annexures to the supporting affidavit as well as the supplementary affidavit.
 3. Upon being served with the Petition, the 1st Respondent herein responded thereto vide replying affidavit sworn by one Corporal Joshua Oburu and which affidavit is sworn on the 17th November 2023. In addition, the deponent has attached various annexures to the supporting affidavit.
 4. On the other hand, the 2nd Respondent herein neither entered appearance nor filed any response. Furthermore, it suffices to state that the 2nd Respondent has never participated in the instant proceedings.
 5. Other than the foregoing, it is imperative to state that the interested party herein sought for and obtained leave to be joined in the matter. In this regard, the application dated the 10th August 2023 and wherein the Interested Party sought to be joined was allowed. For good measure, the Interested Party was thus constituted as such.



6. The Petition herein came up for mention on the 25th July 2024 for directions as pertains to the manner in which the Petition was to be heard. In this regard, it suffices to point out that the Advocates for the respective parties intimated to the court that same were desirous to prosecute the Petition on the basis of affidavit evidence. Besides, the advocates for the parties posited that same shall be keen to file and exchange written submissions.
7. Pursuant to the foregoing, the court proceeded to and directed the advocates for the parties to file and exchange written submissions. For coherence, the advocates for the petitioner, 1st Respondent and the Interested Party thereafter proceeded to and obliged.

Parties' Submissions:

a. Petitioner's Submissions:

8. The Petitioner herein filed written submissions and in respect of which same [Petitioner] adopted the grounds enumerated in the body of the Petition as well as the averments contained in the supporting affidavit. Furthermore, the Petitioner also adopted and highlighted the contents of the further affidavit sworn on the 26th February 2024.
9. Additionally, the Petitioner herein raised, highlighted and canvassed three [3] salient issues for consideration by the court. Firstly, the Petitioner submitted that same entered onto and commenced to occupy L.R No. Nairobi/Block 99/142 [hereinafter referred to as the suit property] on or about the year 2001. Besides, it was contended that upon the entry onto the suit property, the Petitioner cleared the bushes thereon and commenced to develop same.
10. It was the further submission by the Petitioner that same has been in occupation of the suit property for more than 20 years. Consequently and in this respect, the Petitioner contends that same has since accrued lawful rights thereto vide adverse possession.
11. It was the further submissions by the Petitioner that owing to the duration of possession, same proceeded to and filed a suit namely, Milimani ELC E012 of 2023 [OS]; between Alfred Juma Ayora v Teresia Adhiambo Odhiambo and The Chief Land Registrar, respectively.
12. On the other hand, the Petitioner contended that following the filing of the suit, [details in terms of the preceding paragraph], the Environment and Land court proceeded to and issued orders of temporary injunction to restrain the interested party from interfering with his [Petitioner's] occupation, possession and use of the suit property pending the hearing and determination of the suit.
13. Based on the foregoing, the Petitioner has contended that same has therefore acquired and accrued lawful rights over and in respect of the suit property and which rights are the subject of determination before the Environment and Land court in respect of the originating summons.
14. Secondly, the Petitioner herein has contended that despite the existence of the orders of temporary injunction and status quo which were issued by the court vide , Milimani ELC E012 of 2023 [OS] Between Alfred Juma Ayora v Teresia Adhiambo Odhiambo and The Chief Land Registrar, the 1st Respondent herein dispatched her officers including Polycap Magai, Desterio Omukanga and Joshua Oburu, to arrest his [Petitioner's] agents who are guarding and taking care of the Petitioner's rights on the suit property.
15. Furthermore, the Petitioner contended that the arrest and detention of his Petitioner's agents by the officers of the 1st Respondent, under the guise that the 1st Respondent is investigating the offence of



false swearing and conspiracy, were intended to harass and intimidate the Petitioner's agents and by extension the Petitioner.

16. Nevertheless, the Petitioner has submitted that the purported investigations being carried out by the 1st Respondent are actuated by malice and bad faith and in any event, same [investigations] are intended to defeat the civil proceedings which are pending before a court of competent jurisdiction.
17. Premised on the foregoing, the Petitioner has thus contended that the investigations by officers of the 1st Respondent and the intended prosecution are inspired by ulterior motives. In this regard, the Petitioner has posited that the issues being investigated forms and found the basis of the civil case which is pending.
18. Thirdly, the Petitioner has submitted that arising from the offensive investigations and the threatened prosecution of his [Petitioner's] servants., the Respondents herein have violated the Petitioner's agents' rights and fundamental freedoms. In this regard, the Petitioner has implored the court to found and hold that the investigations, arrest and threatened prosecution are unconstitutional.
19. Arising from the foregoing, the Petitioner has thus invited the court to find and hold that same has since established and demonstrated the requisite basis to warrant the grant of the orders/reliefs sought at the foot of the petition.
20. To buttress the submissions and more particularly, the aspect that same [Petitioner] has met and/or satisfied the basis to grant the declaratory reliefs, the Petitioner has cited and referenced inter-alia the case of Commissioner of Police and Director of Criminal Investigations Department & Another v Kenya Commercial Bank Ltd & 4 Others [2013]eKLR; Alfred N Mutua v Ethics & Anti-Corruption Commission & 4 Others [2016]eKLR; Samuel Asiago Kiari v Directorate of Criminal Investigations & 2 Others [2021]eKLR and Republic v Director of Public Prosecution & 2 Others [Ex-parte Praxsidis Namoni Saisi] [2016]eKLR, respectively.

b. 1st Respondent's Submissions:

21. The 1st Respondent filed written submissions and in respect of which same has adopted and reiterated the contents of the replying affidavit sworn on the 17th November 2023 by one Corporal Joshua Oburu. In addition, the 1st Respondent has highlighted and canvassed three [3] salient issues for consideration by the court.
22. First and foremost, learned counsel for the 1st Respondent has submitted that the arrest and intended prosecution that are complained of at the foot of the instant Petition relates to Leanford Shihachi and Harrison Muyela, respectively and not the Petitioner. In this regard, it has been contended that the petitioner herein cannot purport to mount and maintain the Petition on behalf of the named persons, without the requisite authority or otherwise.
23. Furthermore, learned counsel for the 1st Respondent has submitted that the servants and/or agents of the Petitioners, on whose behalf the Petition herein has been filed have not authorized the filing of this Petition. At any rate, it has been contended that the said Leanford Shihachi and Harrison Moyela, have not filed any affidavit in support of this Petition.
24. Secondly, learned counsel for the 1st Respondent has submitted that the Petitioner herein has neither established nor demonstrated any basis to show that the impugned investigations were informed by ulterior motives. In any event, learned counsel for the 1st Respondent has cited and referenced the provisions of Section 35 of the [National Police Service Act](#), which outlines the mandate and functions of the National Police Service.



25. In particular, it has been submitted that the 1st Respondent herein has a constitutional and statutory mandate to undertake inter-alia investigations pertaining to commission of criminal offenses and thereafter to recommend charges to the 2nd Respondent, were apposite.
26. Thirdly, it has been submitted that even though the court has the requisite mandate to interrogate whether or not the 1st Respondent is exercising its powers in accordance with the *Constitution*, the court must nevertheless exercise due caution and necessary circumspection. In this regard, it has been posited that the court must not assume the mandate of the 1st Respondent or act in any manner that will defeat the discharge of the functions of the 1st Respondent.
27. In a nutshell, learned counsel for the 1st Respondent has submitted that the investigations that were commissioned by the 1st Respondent were lawful and within the circumscribed powers of the 1st Respondent. In this regard, it has been contended that the Petition beforehand is therefore misconceived and legally untenable.

c. Interested Party Submissions:

28. The Interested party filed written submissions and wherein same has adopted and reiterated the contents of the replying affidavit sworn by the Interested party as well as the Notice of Preliminary Objection dated the 3rd July 2024. Thereafter the interested party has highlighted four [4] salient issues for consideration by the court.
29. Firstly, learned counsel for the interested party has submitted that the dispute beforehand does not touch on and/or concern ownership of, title to or use of land in accordance with the provisions of Article 162 [2] [b] of the *Constitution*. In this regard, learned counsel for the interested party has submitted that the dispute beforehand does not fall within the jurisdiction of this court.
30. Additionally, learned counsel for the interested party has submitted that the issues raised at the foot of the Petition touch on and concern [sic] investigations pertaining to commission of criminal offenses, arrest of the culprits and the intended prosecution of Leanford Shihachi and Harrison Muyela, respectively.
31. Arising from the foregoing, learned counsel for the interested party has therefore submitted that the Environment and Land court is divested of the requisite jurisdiction to entertain and or adjudicate upon the subject dispute. Consequently, learned counsel has invited the court to strike out the Petition.
32. In support of the submissions pertaining to lack of jurisdiction, learned counsel for the interested party has cited and referenced various decisions inter-alia Republic v Karisa Chengo & 2 Others [2017]eKLR, Co-operative Bank of Kenya Ltd v Patrick Kangéthe Njuguna & 5 Others [2017]eKLR, S K Macharia & Another v Kenya Commercial Bank [2012]eKLR and Owners of Motor Vessel Lilian S v Caltex Kenya Ltd [1989]eKLR, respectively.
33. Secondly, learned counsel for the Interested Party has submitted that the Petitioner herein has not pleaded the violations complained of, with the requisite specificity and particularity. In this regard, it has been contended that the Petitioner has merely made omnibus allegations but which same [Petitioner] has not substantiated.
34. In support of the foregoing submissions, learned counsel for the interested party has cited and referenced the decision in Annarita Karemi Njeru v Republic [1979]eKLR, wherein the court underscored the necessity to plead the violations complained of with the necessary particularity.
35. Thirdly, the Learned counsel for the interested party has submitted that the reliefs sought by the Petitioner cannot be granted by the court. In particular, it has been contended that the grant of the



reliefs enumerated at the foot of the Petition shall be tantamount to stopping the 1st Respondent and other law enforcement agencies from discharging their statutory mandate.

36. To this end, learned counsel for the interested party has cited and referenced various decisions inter alia the Commissioner of Police and the Director of Criminal Investigations & Another v Kenya Commercial Bank & 4 Others [2013]eKLR; Republic v Commissioner of Police & Another Ex-parte Michael munari & Another [2012]eKLR; Republic v Commissioner of Police & Another and Republic v Director of Public Prosecution & 2 Others [2023] KEHC 228 [KLR], respectively.
37. Finally, learned counsel for the interested party has submitted that the Petitioner herein has neither accrued nor acquired any lawful rights to and in respect of the suit property capable of being violated. In this regard, it has been contended that the Petitioner's claims to and in respect of the suit property are still pending determination and thus no lawful rights have accrued.
38. In addition, learned counsel for the interested party has submitted that the fact that the Petitioner has filed, Milimani ELC E012 of 2023 [OS] between Alfred Juma Ayora v Teresia Adhiambo Odhiambo and The Chief Land Registrar seeking adverse possession over the suit property does not by itself denote that the Petitioner is the owner of the suit property.
39. In support of the foregoing submissions, learned counsel for the interested party has cited and referenced the decision in the case of Joseph Letuya & 21 Others v Attorney General & 5 Others [2014]eKLR, wherein the court underscored that the Constitution can only be invoked towards protecting legitimate rights which has accrued and not otherwise.
40. Premised on the foregoing submissions, learned counsel for the interested party has invited the court to find and hold that the Petition before the court is not only premature and misconceived, but that the reliefs sought thereunder are also untenable. Besides, it has been contended that the honourable court is devoid of the requisite jurisdiction to entertain the subject Petition.

Issues for Determination:

41. Having reviewed the Petition, the affidavits in support thereto, the responses thereto and the various submissions filed by the advocates for the respective parties, the following issues do crystalize [emerge] and are thus worthy of determination;
 - i. Whether the Petitioner is seized of the requisite Locus standi to commence and maintain the Petition [sic] on behalf of the Leanford Shihachi and Harrison Muyela or otherwise.
 - ii. Whether the Environment and Land Court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject Petition.
 - iii. Whether the Petitioner herein has demonstrated the requisite basis to warrant the grant of [sic] the orders sought.

Analysis and Determination:

Issue Number 1

Whether the Petitioner is seized of the requisite locus standi to commence and maintain the Petition [sic] on behalf of the Leanford Shihachi and Harrison Muyela or otherwise.

42. The Petition beforehand adverts to various persons, the Petitioner, Leanford Shihachi and Harrison Muyela. Suffice it to point out that the Petitioner contends that Leanford Shihachi and Harrison Muyela are his servants and/or agents.



43. Furthermore, the Petitioner herein has contended that the 1st Respondent dispatched her officers and/or agents who thereafter proceeded to and arrested Leanford Shihachi and Harrison Muyale, who are the Petitioner's agents on the 16th June 2023. Further and at any rate, it has been contended that the impugned arrest and the attendant detention of the said servants was unlawful and malicious.
44. Other than the foregoing, the Petitioner has contended that the arrest, detention and threatened prosecution of Leanford Shihachi and Harrison Muyale, constituted continued harassment of the Petitioner and his agents and which harassment is intended to evict the Petitioner from the suit property.
45. After highlighting the various allegations pertaining to and concerning the arrest, detention and threatened prosecution of Leanford Shihachi and Harrison Muyela, the Petitioner has thereafter proceeded to and sought various reliefs, not only on his own behalf but on behalf of the Leanford Shihachi and Harrison Muyela.
46. For ease of reference and appreciation, it suffices to reproduce reliefs [e], [f] and [g] at the foot of the Petition. Same states as hereunder;
- i. A declaration that the Respondents have violated the rights of the Petitioner and his agents namely Leanford Shihachi and Harrison Muyela in effecting their arrest on 16th June, 2023 at 7 pm contrary to the orders issued by the Court on order issued on 17th April, 2023 in Nairobi ELC Case No. E012 OF 2023 (OS)-Alfred Juma Ayora versus Teresiah Adhiambo Odhiambo & Chief Land Registrar
 - ii. A declaration that Leanford Shihachi and Harrison Muyela are entitled to compensation of Kshs. 25,000,000.00 each as damages for their illegal and unlawful arrest and detention.
 - iii. A declaration that in arresting Leanford Shihachi and Harrison Muyela despite knowledge of the order issued on 17th April, 2023 in Nairobi ELC Case No. E012OF 2023 (OS)-Alfred Juma Ayora versus Teresiah Adhiambo Odhiambo & Chief Land Registrar, officers of the 1st Respondent namely Polycarp Magai, Desterio Omukanga and Joshua Oburu have violated the national values of integrity, good governance, transparency, professionalism and accountability under Articles 10 and 232 of the Constitution and are unfit to hold office in the National Police Service or any other public office in the Republic of Kenya.
47. From the reliefs, [whose details have been highlighted in the preceding paragraphs], there is no gainsaying that the Petitioner is not only seeking reliefs and recompense on his own behalf, but is also propagating the Petition on behalf of the two other persons, who are contended to be his servants.
48. Arising from the foregoing, the question that comes to the fore is whether the Petitioner herein has the requisite locus standi to mount and maintain the Petition on behalf of the two other named persons.
49. To start with, there is no gainsaying that what is before the court is a constitutional petition. In this regard, the provisions of Article 22 and 258 of the Constitution 2010, mandates any person to file a Petition on his/her own behalf or on behalf of another person. However, it is evident and apparent that the Petition can only be filed on behalf of another person where it is demonstrated that such other person cannot act in his/her own name.
50. In my humble view, the provisions of Article 22 of the Constitution, 2010 are clearly worded so that a Petition can be brought in various instances with a view to protecting the interests of persons including those of unsound mind [who are protected by the guardian ad litem], minors [who are protected by guardians and next friends] or persons authorized vide power of attorney.



51. In this regard, if the Petitioner herein was keen and desirous to propagate the Petition on behalf of Leanford Shihachi and Harrison Muyela, same [Petitioner] was obliged to either demonstrate that the two persons have donated a power of attorney or otherwise authorized the petitioner to file the Petition on their behalf.
52. Other than the foregoing, the petitioner was also at liberty to demonstrate vide affidavit evidence that the named persons, namely Leanford Shihachi and Harrison Muyela, are incapable of acting in their own names.
53. Notwithstanding the foregoing, it is important to underscore that the Petitioner herein has not demonstrated the basis upon which same [Petitioner] is purporting to propagate the Petition on behalf of Leanford and Harrison. For good measure, it is not enough to state that the said two persons are his employees, agents and/ or servants.
54. At any rate, the mere fact that one is an employee of the other, does not vest any capacity in [sic] the employer to supplant the authority and capacity of the employee and to act on the employee's behalf without authority. Quite clearly, the Petition beforehand has been mounted on behalf of Leanford and Harrison albeit without the requisite locus standi.
55. Instructively, the Petitioner may want to argue that what is before the court is a constitution Petition. However, I hasten to underscore that the provisions of Articles 22 and 258 of the Constitution 2010, did not provide a carte blanche for every busy body to approach the court.
56. At this juncture, it is imperative to reproduce the provisions of Article 22 and 258 of the Constitution 2010. Same are reproduced as hereunder;

Enforcement of Bill of Rights.

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.
Enforcement of this Constitution.

258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.



57. My reading of the two provisions [supra] of the *Constitution* drive me to the conclusion that prior to and before a petition is filed on behalf of another person, the Petitioner must satisfy the threshold adverted to and highlighted at the foot of Article 22 [2] [a] and 258 [2] [a], respectively.
58. On the other hand, it is not lost on the court that despite the *Constitution* 2010 relaxing the strictures governing locus standi, the question of capacity to sue still remains and hence the Petitioner was enjoined to demonstrate such capacity. In this regard, it is imperative to take cognizance of the holding in the case of *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Judicial Service Commission (Petition 167 of 2016)* [2016] KEHC 7697 (KLR) (Constitutional and Human Rights) (31 May 2016) (Ruling), where the court considered the scope of locus standi in constitutional matters.
59. For coherence, the court stated and held thus;

Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010 as follows:

Over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

The strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives locus standi to any member of public acting bona fide and having sufficient interest in instituting an action for redress of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the *Constitution* or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy... In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of locus standi were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and



other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated.

As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...”

54. The Court continued:

In the interest of the realisation of effective and meaningful human rights, the common law position in regard to locus standi has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to locus standi is required to fulfil the Constitutional court’s mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled.”

60. Like wise, the issue of locus standi was also adverted to and elaborated upon by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission* (Civil Appeal 290 of 2012) [2013] KECA 445 (KLR) (Civ) (26 July 2013) (Judgment).



61. For coherence, the Court of Appeal stated at page 16 as follows:

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts.

In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant.

We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.”

62. Suffice it to state that in constitutional matters, the issue of locus standi must be looked at in a broad manner. However, despite the broadening of the scope of locus standi in constitutional matters, it is still incumbent upon every Petitioner to demonstrate that same [Petitioner] is not a busy body. For good measure, the petitioner must demonstrate the personal stake, interest or nexus with the issues being litigated, unless the issues at hand touch on public interests.
63. Barring the demonstration of sufficient interests or connection, no Petitioner, can approach the court on behalf of another. In this regard, it is my finding and holding that the Petitioner herein has neither met nor satisfied the provision of Articles 22 [2] [a] and 258 [2] [a] of the Constitution, 2010.
64. Flowing from the foregoing discussion, my answer to issue number one [1] is twofold. Firstly, the Petitioner herein has neither demonstrated that Leanford Shihachi and Harrison Muyela, are persons who cannot act on their own or otherwise.
65. Secondly, the petitioner has not demonstrated that Leanford Shihachi and Harrison Muyale, who are obviously persons of sound minds and disposition, have authorized same [Petitioner] to institute the Petition on their behalf.
66. In the circumstance, the bottom line is that the Petitioner is devoid of the requisite locus standi to file and or maintain the Petition and the reliefs thereto, on behalf of Leanford Shihachi and Harrison Muyale in the absence of authority.

Issue Number 2

Whether the Environment and Land Court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject Petition.

67. The petitioner herein has raised and adverted to various complaints at the foot of the Petition. Nevertheless, the golden thread that runs across the Petition beforehand and the affidavits in support thereof touch on and concern the following;
- a. Illegal and unlawful arrest of Leanford Shihachi and Harrison Muyela.
 - b. Illegal, unlawful and wrongful detention of Leanford Shihachi and Harrison Muyale by the 1st Respondent.



- c. Misuse and/or abuse of criminal process to intimidate and harass the Petitioner and his agents.
 - d. Deployment of criminal process in a bid to evict the Petitioner and agents from the suit property.
 - e. Threatened prosecution of the Petitioner’s agents on complaints touching on ownership of the suit property.
 - f. Intended prosecution during the pendency of civil proceedings vide Milimani ELC E012 of 2023 [OS].
68. Pertinently, the foregoing grievances colour the contents of paragraphs 13, 14, 15, 16, 17, 18, 19 and 20 of the Petition before the court. In this regard, the question that does arise is whether the Environment and Land court is seized of the requisite jurisdiction to interrogate and adjudicate upon the propriety or otherwise of the criminal investigations being undertaken by the 1st Respondent or otherwise.
69. On the other hand, it is imperative to state and outline that before the court ventures forward to prohibit the 1st Respondent from investigating the petitioner and his agents as pertains to the criminal complaints as well as to prohibit the prosecution, the court must engage with the process and the legality attendant to the complaints.
70. However, the interrogation of the propriety or otherwise of the complaints ventilated and canvassed by the Petitioner herein can only be undertaken by the requisite court. In my humble view, the complaints adverted to fall within the jurisdictional remit of the high court by dint of the provisions of Article 165 [3] of the Constitution 2010.
71. On the contrary, the Environment and Land court, which is established pursuant to Article 162 [2] [b] of the Constitution 2010 is not mandated to engage with and interrogate the propriety of criminal investigations being undertaken by the 1st Respondent herein. Furthermore, the Environment and Land court can also not interrogate the legality or otherwise of the prosecutions recommended by the 2nd Respondent in exercise of the constitutional powers underpinned by Article 157 of the Constitution, 2010.
72. Suffice it to state that the Environment and Land court can only assume and exercise jurisdiction in matters where it is demonstrated that the dispute beforehand touches on ownership of; title to or right to use land. To this end, it suffices to reproduce the provisions of Article 162 [2] [b] of the Constitution, 2010.
73. For ease of reference and appreciation, the provisions of Article 162 [2b] [supra] are reproduced as hereunder;

162.

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- (2) Parliament shall 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.



74. Quite clearly, the issues that have been raised and canvassed at the foot of the subject Petition do not fall within the purview of the Environment and Land court. In any event, there is no gainsaying that the Petitioner herein is not laying any claim to ownership of land or title thereto as against the Respondents.
75. Furthermore, the only mention of land, namely the suit property is because the investigations touch on and concern [sic] false swearing of documents pertaining to the land and conspiracy to defraud. However, the issue of ownership of land is not in contest at the foot of this Petition.
76. At any rate, it is important to point out that the petitioner has endeavoured to conflate the issues at the foot of this Petition with [sic] the civil proceedings vide ELC E012 of 2023 [OS] but the common ground is that the suit is separate and distinct. For good measure, the originating summons seeks private claims as against the interested party herein, whereas this Petition is founded on public law and the claims are against statutory agencies discharging public functions.
77. Simply put, the attempt by the Petitioner herein to rope in the orders which were procured and obtained vide ELC E012 of 2023 [OS], is calculated to dupe the court into believing that the Respondents are acting in contempt of court orders. Far from it. In any event, there is no gainsaying that the orders referenced were not issued against the Respondents.
78. Back to the question of jurisdiction. It is imperative to state that where a court is divested of jurisdiction, such a court must down its tools at the earliest. Suffice it to posit that jurisdiction is central and integral to the adjudication of every dispute.
79. To this end, I beg to reference the holding in the case of *In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling)*.
80. For coherence, the court stated as hereunder;
29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1*, which bears the following passage (Nyarangi, JA at p.14): “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”
30. The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.
81. The centrality of jurisdiction was revisited by the Supreme Court in the case of *Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling)*, where the court stated thus;
68. A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to



whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*.

Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

82. Where a court entertains and adjudicate[s] upon a matter in respect of which the court is divested of jurisdiction, the entire proceedings and the resultant orders are null and void. In this regard, all the proceedings that shall have been taken before the environment and land court, would become void and a nullity ab initio.

83. To underscore the significance of jurisdiction, it suffices to cite and reference the holding in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (Civil Appeal 244 of 2010)* [2019] KECA 767 (KLR) (Civ) (10 May 2019) (Judgment), where the court held thus;

1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.

It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

84. Without belabouring the point, my answer to issue number two [2] is to the effect that the Environment and Land court is devoid and divested of the requisite jurisdiction to adjudicate upon complaints pertaining to the propriety of criminal investigations, criminal arrest and intended prosecution.

85. For good measure, such complaints clearly fall within the jurisdictional remit of the high court and not otherwise. See Article 165 [3] of the *Constitution* 2010].

Issue Number 3

Whether the Petitioner herein has demonstrated the requisite basis to warrant the grant of [sic] the orders sought.

86. Having found and held that the Environment and Land court is not seized of the requisite jurisdiction to entertain the issues raised and canvassed at the foot of the Petition, it would have been apposite to terminate the judgment and to strike out the Petition.



87. However and for the sake of completeness, there is need to canvass the third issue herein albeit in brief. To start with, what I hear the Petitioner to be complaining against is that the 1st Respondent is undertaking criminal investigations pertaining to certain documentation which impact on the suit property. In this respect, the Petitioner posits that the impugned investigations are being undertaken during the pendency of a civil suit, namely, Milimani ELC No. E012 of 2023 [OS].
88. Additionally, I hear the petitioner herein to be saying that because there is already a civil suit, namely, Milimani ELC E012 of 2023 [OS], the Respondents herein ought not to commence any criminal investigations and or effect any arrest until the civil suit is heard and concluded.
89. The other perspective that also flows from the petition is to the effect that the criminal investigation[s] and the threatened prosecution are being undertaken for collateral purpose. In this regard, the Petitioner contends that the criminal investigations and the threatened prosecution are intended to evict same [Petitioner] from the suit property.
90. To my mind, there mere fact that the Petitioner has filed a civil suit, namely, Milimani ELC No. E012 of 2023 [OS] against an interested party does not constitute a bar to the lodgement of criminal complaint and even arrest and prosecution, where a cognizable offense is found to exist.
91. In this respect, it is imperative to appreciate the import and tenor of Section 193A of the Criminal Procedure Code, Chapter 75 Laws of Kenya. Same states as hereunder;
- 193A. Concurrent criminal and civil proceedings:
- Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.
92. Flowing from the contents of Section 193A Of the Criminal Procedure Code, it is evident that the mere fact that there exists a civil suit touching on a particular matter does not suffice to exclude the commencement of criminal proceedings. For good measure, where a basis does exist, then the authorized agencies are at liberty to commence and maintain criminal prosecution.
93. The import and tenor of Section 193A of the Criminal Procedure Code were highlighted and elaborated by the Supreme court of Kenya in the case of Dande & 3 others v Director of Public Prosecutions & 2 others (Petition 4 (E005) of 2022) [2022] KESC 23 (KLR) (19 May 2022) (Ruling), where the court held thus;
- [103] The appellants also claimed that the civil suits aforesaid were settled to their exclusion meaning that they were not parties to the suits. If so, what is the prejudice to them? And if the settlement is relevant to their innocence, what better forum is there than the trial court to raise that issue? Furthermore, Section 193A of the Criminal Procedure Code provides as follows:
- 193A. Concurrent criminal and civil proceedings
- Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition, or delay of the criminal proceedings.”
- [104] The conclusion we draw from the above provision is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either



of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.

94. Lastly, it is not lost on this court that before any litigant, the Petitioner not excepted can proceed to procure and obtain an order to bar and or prohibit the Respondent from undertaking investigations and criminal prosecution, the Petitioner must demonstrate that the impugned investigations and threatened prosecutions smack of mala fides or better still, constitute an abuse of the due process of the court.
95. For coherence, the threshold to be established before the court can intervene were highlighted by the supreme court in the case of Dande & 3 others v Director of Public Prosecutions & 2 others (Petition 4 (E005) of 2022) [2022] KESC 23 (KLR) (19 May 2022) (Ruling).

[100] Furthermore, in the same case, we were persuaded by the reasoning of the Supreme Court of India in RP Kapur v State of Punjab AIR 1960 SC 866 which laid down the following guidelines to be considered by courts when reviewing prosecutorial powers as follows:

- i. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or
 - ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
 - iii. Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
 - iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
96. Pertinently, the Petitioner herein cannot merely stride into court and make allegations like the ones at the foot of the Petition and thereafter imagine that a court of law will grant orders to prohibit the Respondent from undertaking their constitution and statutory functions.
97. Suffice it to posit, that before any prohibitory/ conservatory order can issue, the court seized of the matter [certainly, not Environment and Land Court] must be satisfied that the Respondents are acting ultra vires the relevant provisions of the law. [See Article 157, 244 and 245 of the Constitution 2010].
98. In short, I beg to state that even if I had found that the environment and land court was seized of jurisdiction [which is not the case], I am afraid that the Petitioner herein would not have been entitled to the reliefs enumerated at the foot of the Petition. For good measure, the Petitioner has not established and or proved the requisite ingredients that would have warranted such intervention. [See Commissioner of Police and The Director of Criminal Investigations Department & Another v Kenya Commercial Bank Ltd & 4 Others [2013]eKLR; and Republic v Commissioner of Police & Another Ex-parte Michael Munri & Another [2012]eKLR];

Final Disposition:

99. Aring from the analysis adverted to in the body of the judgment, it is evident that the issues that underpin the Petition beforehand do not fall within the jurisdictional remit of the Environment and Land court. Instructively, the Environment and Land court cannot interrogate the propriety or otherwise of criminal investigations, criminal arrest and threatened prosecution.



100. On the other hand, it is also worth recalling that the court found and held that the Petitioner herein cannot purport to instigate the Petition on behalf of Leanford Shihachi and Harrison Muyela without satisfying the threshold in terms of Article 22 [2] [a] and 258 [2] [a] of the Constitution 2010.
101. In the premises, the final orders that commend themselves to the court are as hereunder:
- i. The Petitioner herein is devoid and bereft of the requisite locus standi to maintain the Petition on behalf of Leanford Shihachi and Harrison Muyale.
 - ii. The Environment and Land court is devoid and divested of the requisite jurisdiction to entertain the instant Petition.
 - iii. The Petition dated the June 19, 2023 be and is hereby struck out.
 - iv. Costs of the Petition be and are hereby awarded to the 1st Respondent and the interested party. Same to be agreed upon and in default to be taxed by the deputy registrar of the court.
102. Finally and for the avoidance of doubt, the conservatory orders which were issued on the 30th May 2024, by Hon Justice E. K Wabwotto Judge, be and are hereby vacated.
103. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Kavake for the Petitioner.

Mr. Allan Kamau [Principal litigation Counsel] for the 1st Respondent.

Mr. John Mbaluto for the Interested Party.

N/A for the 2nd Respondent.

