



Kariuki, Ndegwa and Kibuthu As Secretary, Chair Person & Treasurer of Kiambu County Tenants Welfare Association & 7 others v Kiambu County Executive Committee & 4 others (Constitutional Petition E005 of 2023) [2025] KEELC 2864 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2864 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CONSTITUTIONAL PETITION E005 OF 2023

JA MOGENI, J

MARCH 27, 2025

IN THE MATTER O THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 22(2) (6), (C) (D) & 165 (3) (D) OF THE CONSTITUION OF KENYA 2010

AND

IN THE MATTER OF AN ALLEGED INFRINGEMENT DENIAL/VIOLATION OF CONSTITUTIONAL RIGHT OF THE MEMBERSHIP OF THE GROUPS OF THE PETITIONERS HEREIN AND THAT OF THE GENERAL PUBLIC IN KIAMBU COUNTY TO GOOD GOVERNANCE INCLUDING THE RULE OF LAW UNDER ARTICLE 10(2) (A) OF THE CONSTITUTION OF KENYA 2010 AND/OR CONFERRED BY THE PROVISIONS OF THE URBAN AREAS AND CITIES ACT NO 13 OF 2011, SECTION 10 OF THE PUBLIC OFFICER ETHICS ACT NO. 4 OF 2003 AMONG OTHER WRITTEN LAWS

AND

IN THE MATTER OF AN ALLEGED INFRINGEMENT DENIAL/VIOLATION OF CONSTITUTIONAL RIGHT OF THE MEMBERSHIP OF THE GROUPS OF THE PETITIONERS HEREIN AND THAT OF THE GENERAL PUBLIC IN KIAMBU COUNTY TO INFORAMTION UNDER ARTICLE 35(3) OF THE CONSTITUTION OF KENYA 2010 AND WHICH RIGHT IS RECOGNIZED AND/OR CONFERRED BY THE PROVISIONS OF PART VIII OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012, THE PUBLIC OFFICER ETHICS ACT NO. 4 OF 2003 AMONG OTHER WRITTEN LAWS

AND

IN THE MATTER OF AN ALLEGED INFRINGEMENT DENIAL/VIOLATION OF CONSTITUTIONAL RIGHT OF THE MEMBERSHIP OF THE GROUPS OF THE PETITIONERS HEREIN AND THAT OF THE GENERAL PUBLIC IN KIAMBU COUNTY TO RECEIVING POWERS OF SELF GOERNANCE UNDER ARTICLE 174 (C) OF THE CONSTITUTION OF KENYA 2010 AND WHICH RIGHT IS



RECOGNIZED AND/OR CONFERRED BY THE PROVISIONS OF PART VIII OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012 SECTION 10 OF THE PUBLIC OFFICER ETHICS ACT NO. 4 OF 2003 AMONTH OTHE WRITTEN LAWS.

AND

IN THE MATTER OF AN ALLEGED INFRINGEMENT DENIAL/VIOLATION OF CONSTITUTIONAL RIGHT OF THE MEMBERSHIP OF THE GROUPS OF THE PETITIONERS HEREIN AND THAT OF THE GENERAL PUBLIC IN KIAMBU COUNTY TO A CLEAN AND HEALTHY ENVIRONMENT UNDER ARTICLES 42, 69 & 70 OF THE CONSTITUTION OF KENYA 2010 RECOGNIZED OR CONFERRD BY THE PROVISIONS OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT NO.8 OF 1999 & SECTION 37 OF THE FOREST CONSERVATION AND MANAGEMENT ACT NO. 34 OF 2016.

BETWEEN

JAMES GACHURU KARIUKI, PETER MWAI NDEGWA & JOYCE NJOKI KIBUTHU AS SECRETARY, CHAIR PERSON & TREASURER OF KIAMBU COUNTY TENANTS WELFARE ASSOCIATION 1ST PETITIONER

FRANCIS GICHEHA MUTURI SUIING AS A MEMBER OF & IN THE INTEREST OF CHANIA GROUP 2ND PETITIONER

RACHAEL NJERI KARIUKI SUIING AS A MEMBER OF & IN THE INTEREST OF NONGAIMWARA ASSOCIATION 3RD PETITIONER

MOSES MEGA GITHINJI SUIING AS A MEMBER OF & IN THE INTEREST OF MALEWASIBS ASSOCIATION 4TH PETITIONER

SIMON THUO KIARIE SUIING AS A MEMBER OF & IN THE INTEREST OF SUGUKNOWIE GROUP 5TH PETITIONER

ROSALINE NJERI CHANGE SUIING AS A MEMBER OF & IN THE INTEREST OF PERSEGULF GROUP 6TH PETITIONER

JOHN NGUGI MUIGAI SUIING AS A MEMBER OF & IN THE INTEREST OF ALKEBLUM GROUP 7TH PETITIONER

PETER NJUGUNA MWANGI SUIING AS A MEMBER OF & IN THE INTEREST OF MATGAC GROUP 8TH PETITIONER

AND

THE KIAMBU COUNTY EXECUTIVE COMMITTEE 1ST RESPONDENT

THE KIAMBU COUNTY GOVERNOR 2ND RESPONDENT

THE KIAMBU COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

THE CABINET SECRETARY IN CHARGE OF URBAN DEVELOPMENT 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT



RULING

1. The Petitioners herein are members of a Welfare Association and Members of diverse Interest Groups with James Gacheru Kariuki on behalf of the 1st Petitioner having been given authority to file the Petition on behalf of the other Residence Association Groups. The Respondents are described as public authorities by the Petitioner.
2. The Petitioners filed a Petition dated 24/04/2023 and a Notice of Motion Application on even date seeking declaratory orders against the Respondents for neglecting to involve the citizenry in public participation as provided under the National Government Coordination Act of 2013, for neglecting to adhere to provisions of Article 183(1) b, for conferring Municipality status to Thika locality and for zoning areas irregularly, unlawfully and unConstitutionally in Kiambu County for the sole purpose of accessing World Bank Funds.
3. The Petitioners are seeking aggravated damages plus general damages for violation of the Constitutional rights to clean and healthy environment under Article 42, 69 and 70 of *the Constitution*.
4. According to the Petitioners, the Respondents being public authorities are expected to give powers of self-governance to the people of Kenta including the Petitioners and enhance the participation of the people in exercise of the powers of the state in making decisions affecting them in line with Article 174 (c) of *the Constitution* and National Government Coordination Act and County Government Act.
5. Further the Respondents are supposed to give information to the people of Kenya through publishing and publicizing any important information affecting the Nation in line with the provisions of Article 35 (3) of *the Constitution*. Plus ensure good governance in line with Article 10 (2) (a) of *the Constitution* among others.
6. In response to the Application the Respondents filed a Preliminary Objection dated 31/08/2023 and averred this Court lacks jurisdiction to hear the current Application and Petition.
7. The Preliminary Objection filed stated as follows:

Take Notice That the Respondent herein shall raise a preliminary objection on the Application dated 24/04/2023 and the entire Petition on the grounds that;

1. Under Article 162 (2) (b) of *the Constitution* of Kenya as read with Section 13 (1)(2)(3) of the Environment and Land Court *Act No. 19 of 2011* the Honourable Court lacks Jurisdiction to hear the current Application and the Petition for the reasons that;
 - i. The Application and the Petition seeks to challenge the enactment, promulgation and publications of various instruments made under the Urban Areas & Cities Act more particularly, The Gazette Notice Number 3658 dated 17/03/2023 which conferred the status of Municipality to Juja, Gatundu, Githunguri, Githurai, Kabete and Lari; the Gazette Notice Number 11309 dated 2nd November 2018 conferring Municipality status to locality; Gazette Notice No. 11310 dated 2/11/2016 conferring Municipality status to Kikuyu Locality; Gazette Notice No. 11311 dated 2/11/2018 conferring Municipality status to Ruiru locality; Gazette Notice No. 11313 dated 2/11/2018 conferring Municipality status to Karuri locality. It therefore follows that the Application and the Petition challenges the Legislation processes as provided for under *the Constitution*, The County Government Act, the Urban Areas & Cities Act



among other Statutes. The *Environment and Land Court Act* lacks jurisdiction to entertain such challenges.

- ii. The Application and the Petition allege. that the Gazettement and subsequent conferment of Municipality Status to various townships was done without public participation contrary to the provisions of Articles 10(2) (a), 174(c) 196(1)(b) of the Constitution as read with sections 87, 115(1)(a) of the County Government *Act No. 17 of 2012*. The question of public participation in legislative process can only be litigated in a Constitutional Court.
 - iii. The Application and the Petition seeks declarations including infringement of rights under Article 183(1)(b) and Section 8(2) section 2 and section 3 as read together with PARTVIII, IX & X of the County Government *Act No 17 of 2012* and the National Government Coordination *Act No 13 of 2011*. These are therefore not within the purview of the *Environment and Land Court Act*.
 - iv. The Application and the Petition calls for interpretation and Application of the provisions of *the Constitution*. That the Application and the Petition does not therefore fall within the Article 162(2) 6 dealing with the use, occupation and title of Land. They cannot therefore be entertained under the auspices of the Environment and Land Court. (*Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others* [2017] eKLR.
 - v. The Application and the Petition challenge previous decisions of the superior Courts including the decisions of the Supreme Court and faults the Courts of having made wrong precedents. Such interpretations cannot be done by the Environment and Land Court.
 - vi. The Application and the Petition seek to overturn the revered principles of interpretation in *Anarita Karimi Njeru Vs. Republic* for being inconsistent with Article 20 (3)(b) of *the Constitution* of Kenya.
 - vii. In totality the Application and the Petition seeks to clarify the legislative process, stages, participation and responsibilities of various stake holders in conferring Municipality status to localities under the Constitution and various laws.
2. The Application and the suit are incompetent as they offend the Provisions of The *Environment and Land Court Act* and Rules 4(1) and 10(1)(2) Constitution of the Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*) Practice and Procedure Rules, 2012 in that;
- a. They exhibit a mongrel of prayers unknown to the law by amalgamating prayers sought in Constitutional declarations; reliefs predicated on infringement of Fundamental Rights and Freedoms; temporary and mandatory injunctions; orders for compensations among others and
 - b. The Application and the Petition as drafted are obfuscating and befuddling as it is unclear whether the Petition in its entirety is a suit predicated under *Environment and Land Court Act*, a Constitutional Petition brought under Constitution of the Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 or a Judicial Review Application premised the Fair Administrative Actions Act, 2015.



3. That the Application and the suit are otherwise frivolous, vexatious and otherwise an abuse of the Court process.
8. The Petitioners in their Petition have relied on *the Constitution* of Kenya 2010, National Government Coordination Act, County Government Act and Urban Areas Act. At the same time the Petitioners have challenged the decisions of the Supreme Court among other laws.

Analysis and Determination

9. The Court directed that the parties file their written submissions in relation to the Notice of Motion Application.
10. The Court has carefully considered the Notice of Preliminary Objection raised by the Counsel for the Respondents and the rival submissions. The Preliminary Objection essentially challenges the jurisdiction of this Court to hear and determine the issues before Court. The Respondent contends that the issues raised are to be determined before the High Court of Kenya as provided for under Article 165(3) of *the Constitution* and not the Environment and Land Court whose jurisdiction under Article 162 (2) (b) of *the Constitution* and Sections 4 and 13 of the *Environment and Land Court Act*, has the mandate to hear any matter related to the Environment and Land, including Constitutional Petitions that touch on use, possession and proprietorship of land.
11. Without reiterating the parties' submissions herein verbatim, suffice to say that I have carefully considered the objection in light of the submissions on record.
12. Having said so, I must point out that the Petitioners' claim principally relates to infringement their rights and fundamental freedoms relating to participation in governance and the failure of the County and National Governments from consulting them in matters of running of urban areas and cities and the County Government. However, the Petitioner posited that the jurisdiction of the Environment and Land Court to deal with the Petition was ousted by the reason that the Petitioner was not claiming title to or ownership of land.
13. I will now turn to the substantive issue at hand. Two issues arise for my determination:
 - i. Whether or not this Court is clothed with jurisdiction to hear and determine these proceedings. If yes;
 - ii. What orders commends themselves to be given.
14. In the case of Owners of Motor Vessel "Lillian S" –vs- Caltex Oil (K) Ltd (supra), Nyarangi JA held as follows:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
15. The Petitioner in his submissions has faulted the Preliminary Objection by stating that the land use planning was only done after the enactment of the Land Use Planning Act. Further that under Article 10(2) of *the Constitution* as read with part VIII of the County Government Act the people are supposed to be consulted and to participate in processes of conferment of municipality status of various areas/ municipalities in Kiambu County and this was not done.



16. That Land Use Planning is provided for under Article 162(2) of *the Constitution* and can only be challenged in the Environment and Land Court. That in the Petition Land Use Planning is the dominant issue and therefore the Petition is rightly before this Court.
17. The Petitioner has relied on the cases of *Cooperative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna and 5 Others [2017eKLR and the case of Supreme Court Petition No. 12 of 2017]* (Consolidated with Petition 11 & 13 of 2017). In the Supreme Court case the Petitioner submits that this Court ought to examine the finding of the Apex Court because in its decision it addressed the issue of public participation as an orbiter and not a ratio decidendi.
18. That the decision in *Anarita Karimi Njeru vs. Republic* need to be reexamined and brought into conformity with Articles 20(3) b. The Petitioner submits that the 1st, 2nd and 3rd Respondents in raising a Preliminary Objection are only concerned about technicalities which should find cure under Article 159 of *the Constitution* and the Court should deal with the substantive issue raised.
19. On their part and in their submissions, the 1st, 2nd and 3rd Respondents hereinafter referred to as Respondents mainly contended that the matters raised in the Petition fall squarely under the Environment and Land Court.
20. The 4th and 5th Respondents did not participate in the Application nor file their response to the Petition.
21. Having briefly summarized the positions taken by each party, I will not belabour a detailed discussion on the subject of jurisdiction. I will, however, briefly reiterate what the Court of Appeal stated in *Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others* (unreported) in a decision rendered on 8th February, 2022 on the doctrine of jurisdiction in general as follows:-

“Jurisdiction is everything, it is what gives a Court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines Court jurisdiction as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular Court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”



22. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ vs. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

“... Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

23. A decision made by a Court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

24. The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of Courts in Kenya is regulated by *the Constitution*, Statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

“... 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.”

25. In Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a Court’s jurisdiction. In the Matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its Ruling, the Supreme Court held as follows:

“(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 itself jurisdiction exceeding that which is conferred upon it by law.”

26. As the objection to the jurisdiction of this Court was raised by way of a Preliminary Objection, I will look at the law on Preliminary Objections.

27. It is the requirement of the law that for a Preliminary Objection to be considered valid, it must raise pure issues of law capable of disposing of a dispute at once. It is, therefore, mandatory for a Court to ascertain that a Preliminary Objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

28. Just like the local classicus case of jurisdiction there is also one for Preliminary Objections and this Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd, (1969) E.A. 696 page 700 where the Court observed as follows: -

“... so far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Objection may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are



correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

29. In Civil Suit No. 85 of 1992, *Oraro vs. Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of Preliminary Objection:-

“... I think the principle is abundantly clear. A “Preliminary Objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

30. In *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a Preliminary Objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus:-

“... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of Preliminary Objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of Preliminary Objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.”

31. On the question as to whether jurisdiction is a point of law, the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene vs. Peter Gichuki Kingara and Six Others*, [2014] eKLR, stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis.

32. I already referred to the mandates and jurisdiction of both the High Court and the Environment and Land Court as provided for in *the Constitution*. I will now briefly enumerate their roles as provided for in order to provide clarity.

33. Articles 165(3) and (6) and 162 of *the Constitution* and Section 13 of the *Environment and Land Court Act* respectively. Article 165(3) and (6) elaborately sets out the jurisdiction of the High Court as follows:

- “(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) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to Constitutional powers of State organs in respect of county governments and any matter relating to the Constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.”

34. On the other hand Article 162(2) and (3) provides as follows: -

- “(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.
- (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2).”

35. The legislation contemplated under Article 162(3) is the *Environment and Land Court Act*.

36. Section 13 thereof outlines the Environment and Land Court’s jurisdiction as follows:-

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all dispute 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;
 - (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 a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.” (emphasis added)

37. The issue of the jurisdiction of the specialized Courts has been determined with finality by the Superior Courts in the famous *Karisa Chengo & 2 Others v Republic* case. The Court of Appeal in *Karisa Chengo & 2 Others v Republic* Civil Appeal Nos. 44, 45 & 76 of 2014 [2015] eKLR observed as follows:-

“The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in *the Constitution* for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment ... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in *the Constitution* of a statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court”

38. The matter was appealed to the Supreme Court in Petition No. 5 of 2015 Republic vs. *Karisa Chengo & 2 Others* [2017]eKLR.
39. Thus the Supreme Court’s decision in the above case is obtaining legal position. I am however aware as has been argued by the Petitioner that the Petition encompasses many issues but the predominant issue is about Land Use Planning. Cases of this nature are sometimes referred to cases raising “cross-cutting’ or ‘cocktail’ or ‘mixed grill’ issues within either Courts.
40. Now, there are two schools of thought that have emerged in the High Court on this matter. One school favoured the ‘pre-dominant purpose test’ whereas the other school rooted for the ‘pre-dominant issue before Court test’.



41. For the proponents of the former position Justice Ngugi J (as he then was) rendered himself in *Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another* (2016) eKLR as follows:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.”

42. On his part, Munyao, J was for the predominant issue before the Court and in case of *Lydia Nyambura Mbugua vs. Diamond Trust Bank Kenya Limited & Another* [2018] eKLR the Learned Judge argued as follows: -

“25. On my part, I would modify the above test, and hold the position that what is important when determining whether the Court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before Court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before Court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before Court. That is why I hold the view, that in making a choice of which Court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.”

43. The Court of Appeal had an occasion and dealt with the issue. In *Co-operative Bank of Kenya Limited vs. Patrick Kang’ethe Njuguna & 5 Others*, [Supra], the Court dealt with the issue as follows: -

“[30] Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as *Cujus est solum, eius est usque ad coelum et ad inferos* (cujus doctrine) which translates to ‘whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell’. As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well

(31) Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it.



(35) ...[F]or 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.”

44. The Court of Appeal, therefore, settled for the ‘pre-dominant purpose test’. Therefore, that is the test I will use in this case.
45. The dispute before this Court is essentially on whether the right to public participation and access to knowledge for the public was violated during the process of conferring municipality status on the areas and localities within Kiambu County. Whether the public can access information to enable them participate in local governance. Then whether this Court can depart from the finding of the Supreme Court on public participation as averred by the Petitioner. The predominant issue, therefore, is the issue of right of public participation in governance of urban areas and municipalities and involvement of citizens through provision of information. The alleged infringement of the Petitioner’s rights to a clean and healthy environment is, hence, ancillary to the main issues.
46. From the guidance of the Court of Appeal in the Co-operative Bank of Kenya Limited case (supra) and the above analysis, there is no doubt that the Petition deals with rights of citizens to public participation, fair administrative action and freedoms and rights as they relate to self-governance. In that case, the jurisdiction of the Environment and Land Court is generally ousted under Article 165(3) and (6) of *the Constitution*. Thus this Court is not clothed with the jurisdiction to determine the issue of public participation in relation to the conferment of municipality status for the subject areas mentioned and gazette by the County Government.
47. I will just briefly commend on the issue of this Court examining decisions of the Superior Courts namely the Court of Appeal and the Supreme Court by stating that this Court is bound by decisions made by the Apex Courts unless such decisions have been set aside.
48. At the helm of the Court system in Kenya is the Supreme Court followed by the Court of Appeal. This Court falls below the Court of Appeal. Decision of the Court of Appeal are binding on this Court. In light of this, for this Court to entertain the Petitioner’s contention in a matter in respect of which the Court of Appeal has pronounced itself, no matter how compelling the arguments placed before it, would be to violate the Constitutional Judicial hierarchical norm. In this regard, I am guided by the holding in the case of Kenya Hotel Properties Limited v Attorney General & 5 Others [2020] eKLR, where the Court of Appeal stated:

“As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice...Its latest rising is the most baffling of all because the Petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. *The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior Courts. Moreover, under Article 164(3) of *the Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all Courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant



sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant’s submission that the issue pits supremacy of the Courts against citizens’ enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized Courts. Any declaration by a Court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a Court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere.”

49. This finding of the Court of Appeal was affirmed by the Supreme Court in *Kenya Hotel Properties Limited vs. Attorney General & 5 Others (Petition 16 of 2020)* [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment), which stated:

“We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher Courts than itself to start de novo, especially on appeals that have been finally concluded by the highest Court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior Courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those Court higher than themselves.”

50. The Petitioner is asking this Court to defy the Constitutional hierarchy of the Courts which is an invitation to judicial anarchy! I think I will leave it at that.

51. Given the foregoing, the Notice of Motion Application and Petition dated 24/04/2023 is hereby struck out. Since the Petition takes on the form of public interest litigation, each party shall bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF MARCH 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

.....Petitioners/Applicants

.....1st, 2nd and 3rd Respondents

.....4th and 5th Respondents

Melita - Court Assistant

.....

MOGENI J

JUDGE

