



Nirestein v Director of Public Prosecution & 5 others (Environment & Land Petition E009 of 2024) [2025] KEELC 2870 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND PETITION E009 OF 2024
LN GACHERU, J
MARCH 27, 2025**

BETWEEN

MICHELLE SCHMIDT NIRESTEIN PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATION 2ND RESPONDENT

NATIONAL POLICE SERVICE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

CHIEF MAGISTRATE NAROK LAW COURTS 5TH RESPONDENT

HARRISON PEMBA TAGA 6TH RESPONDENT

RULING

1. The Petitioner herein Michelle Schmidt Nirenstein filed this Petition dated 7th October, 2024 and sought for various declarations among them;-a declaration that the intended arraignment and prosecution of the Petitioner on three counts is MCCR E1155 of 2024 Republic vs Nirenstein Michelle Schmidt and MCCR E1156 of 2024 Republic vs Nirenstein Michelle Schmidt is a violation of Article 157(II) of *the Constitution* of Kenya by the 1st Respondent;- a declaration that the decision of the 1st Respondent to charge the Petitioner with the offence in MCCR E1155 OF 2024 and MCCR 1156 OF 2024, without proper investigations and application of the evidentiary test is but an abuse of the legal process.
2. The Petitioner also sought for orders of certiorari to quash the Charge Sheets and proceedings in MCCR E1155 of 2024 and MCCR E1156 of 2024; order of prohibition to prohibit the 5th Respondent from giving Pre-trial directions in the above two criminal cases, and prohibition to restraint the 6th Respondent from harassing, threatening, encroaching, attacking or in any manner or



- form on the person of the Petitioner, her property and the staffers of Mara Napa Luxury Camp among other prayers.
3. Simultaneous to the Petition, the Petitioner filed a Notice of Motion Application even dated wherein it sought for conservatory order to stay the continued prosecution of the Petitioner in the two Criminal Cases; prohibition order to restrain the 6th Respondent by himself, his servants, agents, representatives or whatsoever otherwise from entering, encroaching and/ or interfering in whatsoever manner with the premises known as Mara Napa Luxury Camp and/or any movable property including but not limited to motor vehicles situated on Cis-Mara/Talek 406, 407 and 408, and also prohibition from evicting her from the said land parcel No. Cis-Mara/Talek 406, 407 and 408.
 4. On 8th October 2024, the Court certified the matter as urgent and did allow prayers No. 2 and 4 on temporary basis. The temporary orders have been extended severally.
 5. In response to the Petition and the Notice of Motion Application, the 6th Respondent filed a Notice of Preliminary Objection dated 18th October 2024, wherein he averred that; -
 - i. This court lacks the jurisdiction to entertain, hear or determine this Petition.
 - ii. This court does not have jurisdiction over criminal matters.
 - iii. This court does not have supervisory jurisdiction over subordinate courts or other agencies of the criminal justice system.
 - iv. This court cannot oust or usurp the constitutional jurisdiction of the high court through judicial acrobatics or the art and craft or trickery of litigants or their counsel.
 - v. This petition is a clear case of forum shopping and smacks and reeks of improper motives on the part of the petitioner. More importantly, the petition raises a presumption of bias on the part of the court thus compromising the 6th Respondent's rights to fair hearing under Article 50(1) of *the Constitution* and casting serious aspersions on the integrity of the court as a fair and neutral arbiter. It also infringes on the 6th Respondent's fundamental right to equal protection of the law guaranteed under Article 27(1) of *the Constitution*.
 - vi. This petition demonstrates serious judicial overreach and interference over independent organs of the criminal justice system which is made worse by the fact that the court doing so lacks jurisdiction over these organs in the first place.
 - vii. This court cannot transfer this case to the High Court but must dismiss it and leave the Petitioner to her devices.
 6. The 4th and 5th Respondents also filed a Notice of Preliminary Objection dated 11th December 2024 and averred that; -
 - i. This court lacks jurisdiction to hear and determine this dispute and suit as against the Respondent and all consequential orders should be dismissed with costs as the same offends the provisions of Section 13 of the *Environment and Land Court Act* as read together with Article 162(2) (b) of *the constitution* of Kenya, 2010.
 - ii. That the current suit raises issues that are criminal in nature as opposed to a land matter.
 - iii. That the petition is fatally defective, misconceived, and mischievous or otherwise an abuse of the court process and therefore, are unsustainable in the obtaining circumstances.



7. The court directed that the two Preliminary Objections canvassed by way of written submissions. The 6th Respondent filed his submissions dated 18th October 2024, through Kanchory & Co. Advocates and submitted at length, and cited various decided cases.
8. In his submissions, the 6th Respondent submitted that the Environment & Land Court (ELC), is a specialized court with limited sui generis jurisdiction to hear and determine disputes relating to the environment, use and occupation of title to land as provided under Article 162(2) b of *the Constitution* and Section 13 of Environment & Land Court Act and therefore, the ELC cannot assume jurisdiction over matters reserved for the jurisdiction of the High Court. The 6th Respondent/Objector relied on the case of R vs Chengo & 2 others (Pet No. 5 of 2015) 2017 KESC 15 (KLR).
9. It was his further submissions that the sole objective of the Petition herein is to challenge the propriety of the Criminal charges preferred against the Petitioner in MCCR E1155 and MCCR E1156 of 2024, in which cases the Petitioner has been charged with various Criminal Counts. He argued that this court cannot exercise supervisory jurisdiction over the subordinate courts, and other arms or agencies of the criminal justice system which jurisdiction is specific and exclusive to the High Court as provided in the Article 165(6) and (7) of *the Constitution*. It was also submitted that the Environment & Land Court (ELC), has no jurisdiction over criminal matters. He further relied on the same case of R vs Chengo (Supra) where the Supreme Court of Kenya held; -

“ 35 By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of 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 like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics..... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.” [Emphasis added]

10. Further the 6th Respondent/ Objector relied on the case of Macharia & another vs Kenya Commercial Bank Ltd & 2 Others (2012) KESC 8 KLR, where the court held; -

“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.” [Emphasis added]

11. Reliance was also placed in the case of Adegwa & 2 others vs Kibos Distillers Ltd & 5 others KESC 36 (KLR), where the Supreme Court of Kenya held: -

“...a Court even this Court, cannot arrogate itself jurisdiction through crafts of interpretation... and a Court ought to exercise its powers strictly within the jurisdictional limits.” [Emphasis Added]



12. The Objector also submitted that this Petition is a form of forum stopping, and there is presumption of bias. For this, he relied on the case of *Stephenson vs Director of Public Prosecution & 6 others Pet No. E207 of 2021*(2023) KEHC 26465(KLR) where the court held: -

“the court has a duty to, in the first instance, satisfy itself in a matter that it is possessed of jurisdiction otherwise it may end up acting in vain.”

13. Reliance was also placed in the case of *Fortis Tower Management Ltd & another vs Trendmark Computers Ltd* [2018]eKLR, where the court held;

“25. One way to state this is to say that where there is evidence that a party has filed suit in a Court in bad faith or in a manner that signals form shopping, the prudential doctrine counsels that the court should decline to take jurisdiction and should instead request the High Court to transfer the case to the most appropriate court where the case should be heard. In cases where the court in which the case was filed in a seriously inappropriate form, and the filing smirks of bad faith, the court should even dismiss the suit outright.” [Emphasis Added]

14. Therefore, it was his submissions that the Petition herein was filed in this court in bad faith, and with the improper motive, with the aim of ousting the jurisdiction of the High Court, and thus a presumption of bias on the part of the court. Reliance was placed in the case of *Stanley Muia Makau vs R.* [2020] eKLR, where the court held;

“14. On the other hand, “Forum shopping” typically refers to the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity to throw the dice in one’s favour. Such an action would be a subversion of justice with a resultant undermine in the principle of equal protection of the law.”

15. On transfer of this suit to the High Court or court with proper Jurisdiction, it was submitted that the court does not have jurisdiction to handle this Petition and therefore, it cannot transfer the same to the High Court. He cited the case of *Owners of the Motor Vessel ‘Lillian S’ vs Caltex Oil (K) Ltd* [1989] KLR 1, where the court held; -

“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.” [Emphasis Added]

16. Further reliance was placed in the case of *Bishop Christopher Ndungu vs Andrew Abungu* [2006] eKLR, where the court held; -

“I agree with the reasoning of the court in the above case. The applicant cannot apply to transfer a suit which was filed in a court which had no jurisdiction to a court which has jurisdiction. The applicant cannot purport to cure a mistake which he made when he filed the suit in a court which lacked jurisdiction. It is no excuse that he applicant, being a layman, had filed the said suit because he was not aware of the court in which he was to file the suit.” [Emphasis Added]



17. Further, it was the 6th Respondent's submissions that this court not only lacks Jurisdiction to entertain this matter, but also lacks the power to transfer this Petition to the High Court, or to otherwise deal with it other than dismiss it, as transfer of a case to proper court or forum can only be done by a court with the jurisdiction to handle it in the first place. The Objector urged the court to dismiss the instant Petition for lack of jurisdiction to entertain or transfer it to another court.
18. The 1st, 2nd and 3rd Respondents filed their submissions dated 21st November, 2024 in support of the Notice of Preliminary Objection and submitted as follows:
19. It is their submissions that before a court can be seized of a matter, it must be satisfied that it has jurisdiction and/or authority to hear it, and make a determination, and that if a court 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 justice as was stated in the case of Phoenix of E.A Assurance Co. Ltd vs S. M. Thiga T/a Newspaper services [2019] KECA 769(KLR).
20. On whether this court has jurisdiction to hear a Petition or an application for stay of criminal proceedings, and/ or issue conservatory orders to stay criminal proceedings before the subordinate courts, they relied on the case of Owners of Motor Vessel 'Lilian S' vs Caltex Oil (K) Ltd. 1989 KLR, supra
21. They relied on Article 162(2) b of *the Constitution* and Section 13 (2) of the Environment & Land Court Act, which states; -
 - (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*.
22. Further, they submitted that the Petition herein is seeking the Court's intervention in staying criminal proceedings against the Petitioner, and the staying of criminal proceedings is not among the issue that the ELC, has been empowered to exercise over by dint of Article 162(2) b of *the Constitution* and Section 13 of the ELC Act.
23. It was also submitted that the Petition herein and the Notice of Motion Application have been couched as constitutional issues relating to land ownership, and that is a decoy to couch this court with



jurisdiction that it does not possess, in relation to staying of Criminal proceedings before a subordinate court. Reliance was placed in the case of R. vs Chengo (Supra) where the Supreme court held that; -

“The limit of Jurisdictional authority were imposed by a statute, charter or commission under which a court was constituted, and would be extended or restricted by like means. If no restriction or limit was imposed, the jurisdiction was said to be unlimited. A limitation was to be either as to the kind and nature of the actions and matters of which the particular court had cognizance or as to the area over which the jurisdiction would extend; or it would partake both characteristics. Where a court took upon itself jurisdiction which it did not possess, its decision amounted to nothing. Jurisdiction had to be acquired before judgment is given. Jurisdiction was a court’s power to entertain, hear and determine a dispute before it.”

24. The 1st, 2nd and 3rd Respondents in their further submissions argued that this court as an ELC does not have jurisdiction that extends to staying of criminal proceedings before a subordinate court in whatever format as that is an exclusive jurisdiction of the High Court.
25. On whether this court can issue prohibition and/or conservatory orders or stay of Criminal proceedings, they relied on the case of Goddy Mwakio & Joseph Mwangi Muiru & Republic (2011) KECA 305 (KLR), where the court held that an order of stay of proceedings particularly of criminal proceedings is made sparingly, and only on exceptional circumstances, and the order is not given as a matter of course.
26. Further reliance was sought in the case of Ochiel vs OCS Rongo Police Station & 4 Others; Ochiel & another Interested parties 92013) KEHC 2003 (KLR), which cited with approval the case of Joram Mwenda Guantai vs The Chief Magistrate [2007] eKLR, in regard to the jurisdiction of the High Court to stay criminal proceedings.
27. The 1st, 2nd & 3rd Respondents also relied on the case of R. vs Chief Magistrate, Kilgoris, Ex parte Johana Kipngeno Langat [2021] eKLR where the court held; -

“... for the court to stay a criminal proceeding, the applicant must show that the criminal proceeding is being used oppressively or it was instituted for reasons other than to bring the accused to justice. Abuse of process should be established....”
28. The court was urged not to exercise its discretionary power of the superior courts to issue prohibition or conservatory orders or stay in Criminal proceedings, as the jurisdiction to do so does not apply to the ELC, but the High Court as established under Article 165 of *the Constitution*.
29. It was also argued that the Constitutional issues raised in this Petition can as well be ventilated within the subordinate court dealing with the criminal proceedings as the criminal proceedings have adequate safeguard, and this court should not stay the said criminal proceedings. They urged the court to dismiss the instant Petition and Notice of Motion dated 7th October 2024, for lack of jurisdiction to hear this petition and to also issue stay of criminal proceedings.
30. The Preliminary Objection is opposed by the Petitioner herein vide her written submissions dated 14th October 2024 filed by Okwach & Co. Advocates, who submitted on the three issues as follows;
31. On whether the court has jurisdiction to determine this Petition, it was submitted that courts of Equal status have equal jurisdiction to deal with constitutional issue in matters wherein they have jurisdiction over. The Petitioner relied on various cases; - of United States International University vs Attorney General & 2 others [2012]eKLR; Christopher Gatuiri vs Commissioner of Police [2008]eKLR; Jane



Frances Angalia vs Masinde Muliro University of Science & Technology & others [2010]eKLR among others.

32. It was her further submission that despite the distinguished issue of jurisdiction between the Specialized courts and the High Court as stated by the Supreme Court in the case of R. vs Karisa Chengo & 2 others [2017] eKLR, this is a hybrid case as was stated in the case of Zachary Ndungu Gichia vs Family Bank Ltd [2015] eKLR, and there is an overlap of issues, and Petition can fall either in this ELC or the High Court, as both courts have concurrent jurisdiction. In the above case, the court held.

“ Courts must adopt an inclusive approach in mixed grill case for to do otherwise would create overlap and duplicity of evidence not to mention costs.”

33. Therefore, it was the Petitioner’s submissions that this Petition is a mixed grill case as it is multifaceted and it raises constitutional issues that touch on both the jurisdiction of the ELC as well as the High Court. Further, that the Petition herein touches on protection of fundamental rights and protection of property from arbitrary derivation, as or the Occupation, (title) and use of the suit premises being Cis-Mara/Talek/406, 407 and 408. The Petitioner argued that the dispute herein falls within the ambit of the ELC, as stated in Section 13(2) e of the ELC Act, which states “the court will have jurisdiction to hear and determine disputes including; (e) any other dispute relating to environment and land.”

34. Reliance was placed in the case of R vs SPM Shanzu, Director of Public Prosecutio, OCS Bamburi Police Station. Registrar of titles Mombasa, Chief Registrar & National Land Commission; Two Thirds Investment Ltd (Interested party) Ex-parte Kalama Said Kalama & 40 others [2020] KEELC 1443(KLR) where the court held; -

“ As already stated, Section 13(1) of the *Environment and Land Court Act* gives the court original and appellate jurisdiction to hear and determine all disputes relating to environment and land (emphasis mine). Such disputes are provided in Section 13 (2) of the ELC Act and what is set out thereon are not conclusive and therefore the court can hear any other dispute relating to the environment and land.”

35. Further, on the propriety of Criminal charges preferred against the Petitioner, it was submitted that the Petition seeks to invoke the supervisory jurisdiction of the High Court pursuant to Article 165(6) of *the Constitution* to this ELC. The Petitioner relied on the case of R vs Attorney General & another; Kathenge & 3 others (Interested Party); Musyoka Kamusina Ex parte ELC Judicial review E002 of 2022, where the court held; -

“ This court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. This court being in equal status to the High Court is subject to the provisions of Article 165 (b) of *the Constitution* which states thus;

“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 superior court.”



36. Reliance was also placed in the Court of Appeal decision in Daniel N. Mugendi vs Kenyatta University & 3 others [2013]eKLR where the court held; -

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

37. Further, the Petitioner submitted that this court is clothed with jurisdiction to hear and determine this Petition, and it should not decline that jurisdiction. She relied on the case of Lydia Nyambura Mbugua vs Diamond Trust Bank, Kenya Ltd & another [2018]eKLR, where the court stated; -

“But then, one may ask, what if I have a matter which brings forth various issues, some of which fall within the jurisdiction of the High Court or Employment and Labour Relation Court(ELRC) and some falling within the jurisdiction of the ELC, and yet such dispute cannot be severed for the different issues to be heard in different courts? That is a case with mixed issues, some falling within the jurisdiction of the ELC and some falling within the jurisdiction of the High Court or ELRC, the three superior courts with equal status. In such instance one needs to find out what the predominant issue in the case is, and file suit in the court which has jurisdiction to hear the predominant issue.”

38. Therefore, the Petitioner submitted that the predominant issue in the Petition herein emanates from title, use and occupation of the suit premises, and thus the matter is properly before this court.

39. On whether the filing of the Petition is an abuse of the court process, the Petitioner submitted that the Petition herein was filed in this court as the predominant issue relates to land use, and land is the suit premises being Cis-Mara/Talek/406, 407 and 408, this bring the Petition herein within the jurisdiction of this court.

40. On whether the court can transfer this matter to the High Court, it was submitted that this is a mixed grill case; and this court as well as the High Court have jurisdiction. However, if the court was to arrive at a finding that it has no jurisdiction, the Petitioner urged the court to transfer the instant Petition to the High Court, rather than dismissing it. Reliance was placed in the case of Dominic *Et 3 others vs County Government of Narok Et another (court Pet E002 of 2023)* (2023) KEH C17908[KLR] 17th April, 2018) (Ruling), where the court held; -

“For reasons stated above, this is one case where this court and ELC have concurrent jurisdiction but ELC is more suited to deal with the dispute completely even on the technical and substantive matters of environmental protection, use and management, and land use for effective public participation frameworks and designs. A perfect case to decline jurisdiction. Accordingly, this court declines to exercise jurisdiction and refers the case to ELC judge at Narok for directions, hearing and disposal. Orders accordingly.”

41. Ultimately, the Petitioner submitted that this court has the power and/ or discretion to transfer the matter to the appropriate court if it arrives at finding that the High Court is best placed to determine the petition. The Petitioner urged the court to dismiss the instant Notice of Preliminary Objection for lack of merit, and that the said Preliminary Objection should be dismissed with costs.



42. The above are the arguments in support and opposition to the Notice of Preliminary Objection herein. It is evident that in this Preliminary Objection the 6th Respondent/Objector has averred that this court lacks jurisdiction to hear and determine this Petition, since this court has no jurisdiction over criminal matters, and further, the court has no supervisory jurisdiction over subordinate courts in criminal matters.
43. Further, that the Petition is an abuse of the court process, is forum shopping and this court cannot transfer the said Petition to the High Court, because it has no jurisdiction in the first place, but instead, it must dismiss the instant Petition entirely with costs. This being determination on a Preliminary Objection, the court has a duty to first determine whether the said objection meets the description of what amounts to Preliminary Objection.
44. A Preliminary Objection was defined in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 697 as; -
- “... A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point 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.”
45. Further a Preliminary Objection, must be capable of determining the case preliminarily, without having to ascertain facts, and it stems from the pleadings. See the case of Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu High Court Civil Case No. 22 of 1999(UR), where the court held;
- “When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.”
46. In this Notice of Preliminary Objection, the 6th Respondent/ Objector is challenging the Jurisdiction of this court, which issue raises pure points of law, and can be determined without ascertainment of facts from elsewhere. Therefore, this court finds and holds that the Notice of Preliminary Objection herein meets the description of what amounts to a Preliminary Objection as stated in the Mukisa Biscuit(Supra).
47. Basically, the Preliminary Objection herein is challenge to the jurisdiction of this court, it is trite that jurisdiction is everything and without it, the court has not power to make any other step, but to just down its tools. (see the case of Owners of Motor Vessel Lilian ‘S’ (Supra).
48. Further in the case of Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & 2 others [2012]eKLR, the Supreme court held as follows; -
- “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.” [Emphasis Added].
49. Therefore, it is trite that jurisdiction is everything, and where there is no Jurisdiction, the court cannot move further with the matter, as it has no authority to do so. Further, it is evident that jurisdiction flows from *the Constitution*, Legislation or both, and a court cannot arrogate itself jurisdiction.



50. As correctly submitted by the parties herein, this court’s jurisdiction stems from Article 162(2)(b) of *the Constitution* which states; -

“(2) (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to.....(b) the environment and the use and occupation of, and title to, land.”

51. In giving effect to Article 162(2) (b) of *the Constitution*, Parliament enacted ELC Act, which Act also set out the jurisdiction of the court in section 13 as follows; -

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes——

- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (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.”

52. Therefore, it is trite that the jurisdiction of this court constituted as ELC, is guided by *the Constitution* and the ELC Act, and this court cannot arrogate and/or clothe jurisdiction upon itself.

53. The 6th Respondent/Objector averred and submitted that the instant ELC Petition has alleged various infractions of *the Constitution* including violations of the Petitioner’s fundamental rights and freedoms. A keen consideration of the Petition shows the issues described in this Petition can be ventilated under Article 165(3)(b) of *the Constitution*. Issues filed ventilated under this Article, and similar to the issues in this Petition are under the exclusive jurisdiction of the High Court. (see the holding of the SCOK in the case of Chengo supra).

54. Further that the Petitioner has challenged the propriety of criminal charges preferred against the Petitioner in MCCR E1155 of 2024 and MCCR 1156 of 2024. Since the challenge is over the preferring of criminal charges, such challenge does not fall under the disputes that this court can hear and determine as envisaged in section 13 of the Environment & Land Court Act, but are exclusive to the High Court under Article 165(6) and 7 of *the Constitution*.

55. The Petitioner alleged that this Petition herein falls under the category of mixed grill case, and the court should look at the predominant issue, and the predominant issue herein is on occupation, title to land, and use of said land. Further, that being the case, the predominant issue falls under the purview of this court, and therefore this court has jurisdiction to hear the same. See the case of Lydia Nyambura(Supra).



56. As stated earlier, it is trite that the jurisdiction of this court is elaborated in section 13(2) of ELC Act ; and the disputes that this court can hear and determines are disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents , valuations, mining, minerals and other natural resources among others.
57. For this court to determine whether the Petition relates to any of the referred disputes, and whether it has jurisdiction to deal with the matter herein, the court will first consider the prayers sought by the Petitioner herein. In prayers No. (a), (b) and (c) the Petitioner has sought for declarations that the charges against the Petitioners violates Articles of *the Constitution*, and the said charges should not be allowed to stand. Prayer (D) touched on the right to property under Article 40, but this is not the main prayer, and it is a by the way.
58. Prayer No.(e) is on quashing of the charge sheets in respect of the two criminal cases that the Petitioner is facing; and prayers No.(f) and(g), are on prohibition to restrain the Respondents from preferring criminal charges against the Petitioners. On prohibitions sought, only prayer No. (h) seeks to restrain 6th Respondent from harassing, threatening or encroaching on the Petitioner’s alleged property and staff of Mara Napa Luxury Camp.
59. From the prayers sought in the Petition, it is evident that all the above prayers fall outside the purview of section 13(2) of the ELC Act. The Petition is not challenging the use, title and planning and land use on the suit property, but it is basically on her misunderstanding with the 6th Respondent, who late complained to the Police, and she was charged with criminal offences. This is not a dispute falling under the ELC Act.
60. The Petitioner has urged the court to declare that by Charging her with the criminal offence, that was unconstitutional, and this court should quash the said charge sheets. By asking this court to declare that the charging of the Petitioner in MCCR 1155 and 1156 /2024 violates Articles 157(II) of *the Constitution*, the Petitioner is urging the court to determine an issues that falls under the criminal law arena, and thus play a supervisory role over subordinate courts in criminal matters. This supervisory role over criminal matters is not envisaged in section 13(2) of the ELC Act.
61. Further, by asking this court to make declarations that commencement and continuation of MCCR E1155 and E1156/2024 violates the rights of the Petitioner under Articles 10, 26, 27, 29, 40, 47 and 50 of *the Constitution*, this court is being called upon to exercise supervisory role under Article 165(3) b and d of *the Constitution*. However, the prayers that have been sought are basically within the exclusive jurisdiction of the High Court, and the High Court can exercise the said supervisory role.
62. The Petitioner relied on number of decided cases to advance her argument that indeed this court has supervisory jurisdiction over subordinate courts in all matters; She relied on the case of b R vs Attorney General & another, Kathenge& 3 Others (Interested parties); Musyoka Kamusina JR E002/ 2021(2022) KEELC 2555(KLR) and R vs Senior Principal Magistrate Shanzu, Director of Public Prosecution (Supra). However, this court distinguishes the two referred cases, which are Judicial Reviews, and it is trite that Judicial Reviews do not deal with the merit of a case, but rather on the merit of the process that leads to a decision by public bodies.
63. The Petitioner has filed a Petition which seeks various declarations and prohibitions, but not a Judicial Review. Therefore, this court cannot be persuaded by two holdings of courts of concurrent jurisdiction that this court has supervisory jurisdiction over subordinate courts in criminal matters. This court constituted as an ELC has no jurisdiction to quash a charge sheet in a criminal matter before subordinate courts. The High Court plays a supervisory role over the Magistrates Courts in Criminal matters, and quashing of charge sheet is an exclusive jurisdiction of the High Court.



64. This court being guided by the decision of the Supreme Court in the case of R vs Chengo (Supra) finds and holds that in proceedings with the Petition as it is, and finally issuing a determination, that would amount to a nullity or to nothing. See also the case of Adegas & 2 others vs Kibos (Supra) and Orange Democratic Movement vs Yusuf Ali (Supra).
65. The Petitioner also urged the court to consider that this is a mixed grill case and therefore, this court should look at the predominant issue. However, having gone through the Petition and the prayers sought, this court finds the predominant issue herein is the issue of charging of the Petitioner in MCCR 1155 and MCCR 1156 of 2024, with criminal offences, and thus the Petitioner has challenged the charge sheets in respect of the two criminal cases. The Petition herein is not a dispute over the title to land, and use of the suit premises, and therefore, this court finds and holds that it has no jurisdiction to hear and determine the instant Petition.
66. On whether the court should transfer or not transfer this suit to the High Court, but instead should dismiss it for want of jurisdiction, this court finds that the Petition herein was filed in a court without jurisdiction. If the court has no jurisdiction, then there is nothing to transfer. The Petitioner relied on the case of Dominic & 3 others vs County Government of Narok (Supra) in which case the High Court in Narok declined jurisdiction, but referred the case to ELC Narok for hearing and disposal.
67. However, in the above cited case, the High Court held that it had concurrent jurisdiction with the ELC to determine the said matter, but the ELC was more suited to deal with the dispute thereon.
68. In this Petition the court herein does not have concurrent jurisdiction with the High Court, as the issues raised thereon fall under the exclusive jurisdiction of the High Court, and this court has no jurisdiction. There is nothing to transfer as the suit/ Petition herein should have been filed in a court that has jurisdiction.
69. The Court of Appeal in Equity bank Limited vs Bruce Mutie Mutuku T/A Diani Tour & Travel (2016)eKLR ,observed as follows:
- “In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.
70. Further in In Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another [2012] eKLR, the court held as follows: -
- “It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing



and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law.”

Being guided as above, this court finds and holds that it cannot transfer this Petition to the High Court, since it was filed in a court without Jurisdiction. The Petition is a candidate of striking out!

71. Having considered the Notice of Preliminary Objection dated 18th October 2024, by the 6th Respondent/ objector, and the rival written submissions, this court finds it merited and accordingly, the court finds and holds that it has no jurisdiction to hear and determines this matter. Consequently, the Petition herein and the Notice of Motion Application dated 7th October, 2024 are struck out entirely.
72. On the issue of costs, the court finds that costs are awarded at the discretion of the court. However, costs follow the event, as are ordinarily awarded to the successful litigant. The 6th Respondent is the successful litigant, but given the nature of this case; the fact that parties have other litigations elsewhere and the alleged business relationship between the Petitioner and 6th Respondent, the court uses its discretion and directs that each party to bear its own costs.
73. Further, the Court noted that the 4th and 5th Respondents filed their Preliminary Objection dated 11th December 2024, challenging the Jurisdiction of this court. However, they did not prosecute the said Preliminary Objection, and/or support the instant one. This court makes no findings on the said Preliminary Objection by the Attorney General for 4th and 5th Respondents.
74. Ultimately, the court concludes that the 6th Respondent/ Objector’s Notice of Preliminary Objection is merited, thus is allowed, and the Petition herein is struck out with an order that each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 27TH DAY OF MARCH, 2025

L. GACHERU

JUDGE

27/3/2025

Delivered online in the presence of

Meyoki – Court Assistant

Ms Luther H/B for Mr Okwach for the Petitioner

Mr Kanchory for the 6th Respondent/ Objector

N/A by the other Respondents.

