



Law Society of Kenya (Suing on their own Behalf and on the Behalf of Members of Nakuru County) v Kihika & 3 others; Nakuru War Memorial Hospital (Interested Party) (Constitutional Petition E005 of 2024) [2025] KEHC 9016 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CONSTITUTIONAL PETITION E005 OF 2024**

PN GICHOHI, J

JUNE 25, 2025

IN THE MATTER OF ARTICLES 10, 20, 21, 26, 28, 29, 40, 43(1)(A), 60, 64, 67, 162(2) (B), 248(1)(B) AND THE CHAPTER SIX OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 120 OF THE LAND ACT 2012 AND IN THE MATTER OF SECTION 80 OF THE LAND REGISTRATION ACT

2012

BETWEEN

**THE LAW SOCIETY OF KENYA PETITIONER
SUING ON THEIR OWN BEHALF AND ON THE BEHALF OF MEMBERS OF
NAKURU COUNTY**

AND

**HONORABLE SUSAN WAKARURA KIHKA 1ST RESPONDENT
NAKURU COUNTY GOVERNMENT 2ND RESPONDENT
LAND REGISTRAR, NAKURU 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

AND

NAKURU WAR MEMORIAL HOSPITAL INTERESTED PARTY



RULING

1. The Petitioner moved this Court by an Application and Petition both dated 5th March 2024 seeking the following reliefs:-
 - a. A declaration that the process, manner and the decision in which the 1st Respondent by herself, her agents, servants and/or employees forcefully entered the Interested Party's land known as LR No Nakuru- Municipality Block 11/107 formerly LR No. 451/1246 herein and took possession and control thereof was unconstitutional, illegal, embarrassing to Kenyans and a constitutional coup hence null and void.
 - b. A declaration that the 1st Respondent is not a fit and proper person with due regard to her honesty, personal integrity, dignity, respect for the rule of law, respect for human dignity, public good and governance as well as constitutionalism, thus unsuitable to hold public office either as a Governor of Nakuru County or any other public position.
 - c. Any other order this Honourable court may deem just and expedient to grant.
2. The 1st and 2nd Respondents raised a Preliminary Objection dated 2nd May, 2024 on the following grounds; -
 1. That this Honourable Court lacks jurisdiction to hear and determine this matter pursuant to Section 13 of the [Environment and Land Court Act](#) 2011.
 2. That the Subject matter of this suit is Sub-judice Nyandarua ELC No E003 of 2024 pursuant to Section 6 of the [Civil Procedure Act](#) 2010.
3. This Preliminary Objection was canvassed by written submissions.

Petitioner's Submissions

4. The Petitioner crystalized the issues raised into three, that is; Whether the Preliminary objection meets the legal threshold of a Preliminary Objection, whether the Preliminary Objection is merited and who should bear costs of this Application.
5. With regard to the claim that the Petition is sub judice Nyandarua ELC No. E003 of 2023, the Petitioner argued that sub-judice rule is provided for under section 6 of the [Civil Procedure Act](#) and that by the Respondents inviting this Court to look beyond the pleadings filed in this matter and peruse the Nyandarua court file to ascertain the factual basis of the case, removes the issue out of pure points of law contemplated in Preliminary Objection matters. Therefore, that the Preliminary Objections fails the test set out in the classicus case of *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Limited* [1969] E.A 696.
6. Further that the Respondents in their submissions suggest that the determination of Nyandarua ELC No. E003 of 2023 would dispose of this matter when the issue in the two suits are different. That while the Nyandarua ELC No. E003 of 2023, deals with the question of ownership of the property and fraudulent renewal of lease of the property, the current suit has nothing to do with ownership or procedural soundness of the renewal of lease.
7. On which court has jurisdiction to handle this petition, the Petitioner cognizant of the jurisdiction of the ELC court as provided for under section 13 of the [Environment and Land Court Act](#), submitted that the ELC Act at section 13(3) initially provided for a wide scope of that court's jurisdiction,



however upon amendments vide the Statute law (Miscellaneous Amendments) Act, 2012, that jurisdiction was limited to deal with violations relating to health and clean environments under Articles 42,69 and 70 of the Constitution.

8. Accordingly, that the rights and freedoms that have been violated by the respondents include the rights to human dignity, equity, social justice, equality, non-discrimination and the right to access the highest attainable standard of health care services under Articles 10, 19, 26,28 and 43(1)(a) of the Constitution, the freedom and security of person under Article 29(c),(d)&(f) of the constitution and the right to property under Articles 40 as read with Article 64 of the Constitution of Kenya.
9. In addition, that the petition challenged further violations of the Constitution by the 1st Respondent who has failed to discharge her constitutional mandate under Article 21(1) of the Constitution who hired goons to illegally and forcefully gain entry into the interested party's premises, took control of the same and chased out patients and staff in an attempt to take possession and control of the said premises.
10. It was argued that in ordering the 3rd Respondent to cancel the lease for the interested party, the 1st Respondent was putting the lives of the patients and staff and general public in danger, which actions are in violation of Articles 162(2)(b) of the Constitution as read with section 80 of the Land Registration Act, 2012.
11. The Petitioner also submitted that the 1st Respondent violated the provisions of Articles 67 and 248(2) (b) of the Constitution as read with section 120 of the land Act by usurping the powers of the 4th Respondents by forcefully acquiring the suit land and premises.
12. That these actions of illegally taking possession of the suit land is in violation of Chapter six of the Constitution on leadership and integrity and particularly by subverting the rule of law, violating human dignity and good governance.
13. Accordingly, that as per the Petition, the Petitioner is not complaining against clean and health environment as contemplated under Section 13(3) of the Environment and Land Court Act to place the issues herein before that Court.
14. To support the jurisdictional question, the Petitioner relied on the case of Daniel N Mugendi v Kenyatta University & 3 others [2013] KECA 41 (KLR), where the Court of Appeal held that:-

“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.”
15. Further reliance was placed on the High Court 5- Judge bench decision in Patrick Musimba v National Land Commission & 4 others [2015] KEHC 7341 (KLR) that:-

“In view of the 2012 amendments to the ELC Act one would be tempted to conclude that on a true construction of section 13 (3) of the ELC Act the jurisdiction of the ELC in so far as enforcement of constitutional rights was concerned, was limited and restricted by Parliament to matters relating to a clean and healthy environment under Articles 42, 69 and 70 and not environment and land generally under Article 40 of the Constitution. The Court of Appeal's decision in Mugendi as read together with Section 13 of the ELC Act however lead to the plausible conclusion that the ELC has jurisdiction to determine matters of a constitutional nature as well. We also say so as it would be ridiculous and fundamentally



wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

16. The Court further held:-

“We are satisfied that although the jurisdiction in constitutional matters conferred by Section 13(3) of the ELC Act upon the ELC appears limited to questions on and application for redress of a denial violation or infringement or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42,69 and 70 of *the Constitution*, the section did not purport to confer exclusive jurisdiction in such cases upon the ELC so as to impinge upon the provisions of Article 165(3)(b) & (d) of *the Constitution*. We are also satisfied that it could not have been the intendment of the draftsmen of *the Constitution* that when the court is faced with a mixture of causes of action touching on *the Constitution*, especially on fundamental rights, a separationistic approach is to be adopted by the court and half the claim dispatched to one court as the other half is retained.”

17. Similarly, that the instant petition raises issues beyond environment and land. Moreover, none of the issues raised relate to clean and health environment. Thus, the issue raised fall within the jurisdiction of this Court.

18. The Petitioner argued that, in the event the Court finds that both High Court and the ELC have concurrent and coordinated jurisdiction, then in choosing the Court to handle this petition, the Petitioner still placed reliance on the case of Patrick Musimba case (*supra*) where the Court held:-

“We now return to this question: where both courts have jurisdiction which court then exercises it? Flowing from the courts’ decisions in Daniel Mugendi and USIU, neither the High court nor the ELC could be viewed to have exclusive jurisdiction in this petition. Jurisdiction is concurrent and coordinate. Guidance, in such an eventuality, may be obtained from the century old case of *Sim –v- Robinow* [1892]19 L R 665 where Lord Kinnear, with regard to a plea of *forum non conveniens* and in the face of a coordinate jurisdiction, said:- “the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction in which the case may be tried more suitably for the interests of all parties and for the ends of justice”. We have emphasized the two important phrases in Lord Kinnear’s speech. Lord Kinnear’s words led to the principle of ‘appropriateness’ plainly later explained and outlined in the English case of *Spiliada Maritime Corp –v- Consulex Ltd, The Spiliada* [1987] AC 460. In *The Spiliada*, it was held that where there are two courts or tribunals with concurrent or coordinate jurisdiction, the court then seized with the dispute and with jurisdiction may decline to exercise jurisdiction if the alternative tribunal is more appropriate for deciding the dispute in question.”

19. Based on the principle of appropriateness elaborated in the above cited case, the Petitioner urged this Court to hear and determine this matter as the issues raised in the petition majorly relates to violations of rights and freedoms which are within the jurisdiction of this Court.

20. On costs, it was argued that costs follow events, the Petitioner prayed to be awarded costs.



1st and 2nd Respondent's Submissions

21. While supporting their Preliminary Objection, the Respondents herein submitted on two issues, that is; whether this Court lacks jurisdiction to hear and determine this matter and whether the subject matter is sub-judice.
22. On the first issue, it was argued that in seeking to declare the 1st Petitioner unfit to hold office on the grounds that she illegally gained entry into the Interested party's facility and caused damage of unknown value and in seeking a declaratory order against the 1st Respondent for illegally taking possession and control of the suit property, are prayers that centre around the issue of trespass, which issue can only be determined after the issue of ownership of the subject land is considered. Therefore, the issues of ownership which is at the root of this petition is a matter within the mandate of the Environment and Land Court.
23. Respondents submitted that jurisdiction is everything as held in the classic case of Owners Of The Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR), that held that:-

"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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
24. While relying on the case of Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others [2012] eKLR, the Respondents argued that jurisdiction of a court flows from either *the Constitution* or a statute and a court does not have any powers to expand its jurisdiction to handle that which it has not been empowered by law to handle.
25. It was submitted that Article 162(2) of *the Constitution* created the Environment and Land Court and Employment and Labour Relations Court, which are courts of equal status as the High Court. The jurisdiction of Environment and Land Court is provided for under the *Environment and Land Court Act* at section 13.
26. Accordingly, that the issues raised in the petition relating to trespass and ownership of land falls under the jurisdiction of the Environment and Land Court.
27. In support of their arguments, the Respondents cited the case of Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another [2018] KEELC 1599 (KLR), in which the Court held 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."
28. It was then argued that in determining which court is to handle a particular matter, the predominant issue for determination must be settled. Similarly, that the predominant issue as per the Orders sought in the petition relate to trespass to land which boils down to ownership of land, which issues falls within the jurisdiction of Environment and Land Court.



29. On whether this case is sub judice, the Respondents cited the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR), where the Supreme Court held that:-

“The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

30. On that basis, they submitted that the subject matter in this case and Nyandarua ELC No. E003 of 2024 is the same as it seeks to determine ownership of the subject land, the parties are similar as in that case, save for the petitioner who has been changed in this case.

31. Regarding change of the Petitioner in the present suit, the Respondents argued that the said change is for cosmetic purposes, aimed at hoodwinking this Court into perceiving the issue as different, when they are the same. In any case that this Court has held time and again that mere addition of a party does not alter the pith and substance of the suit. In this reliance was placed in the case of Republic V Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR.

32. It was further argued that the determination of Nyandarua ELC No. E003 of 2024, will settle the issue of ownership of land and alleged fraudulent renewal of the lease leaving this court with nothing to determine. Hence, this Court should avoid being placed in an embarrassing position in determining the issue herein should it reach a conflicting determination.

33. The Respondents concluded by reiterating that this is classic case of a land dispute that has been constitutionalised to wrongly invite this Court to handle a land issue. He urged this Court to reject the invitation by allowing the preliminary Objection. But, in the unlikely event that this Court assumes jurisdiction over this matter, then it should stay the same until the Nyandarua ELC E003 of 2024 is heard and determined.

3rd and 4th Respondent’s Submissions

34. The Respondents herein begun by elaborating on the Principles to be observed in handling preliminary objection and cited the classicus case of Mukisa Biscuits Manufacturing Co Ltd V West End Distributors Ltd [1969] E. A 696, that held:-

“that a proper preliminary objection constitutes pure points of law... The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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



points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

35. On that basis, it was argued that a Preliminary Objection can be raised at any point before the final determination of the case.
36. On whether this Court has jurisdiction, the Respondents herein made similar arguments as the 1st and 2nd Respondents and maintained that this Court lacks jurisdiction as the issues raised herewith relate to land which issues are within the jurisdiction of the Environment and Land Court.
37. The Respondents were further in concurrence with the Preliminary Objection that the case herein is sub judice Nyandarua ELC No. E003 of 2024.
38. It was argued that the petition does not meet the threshold set out in Anarita Karimi Njeru V Republic [1979] 1 KLR 154 and the case of Mumo Matemu V Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012 for failing to specifically demonstrate with reasonable precision the manner in which the 3rd and 4th Respondents have violated the Petitioner’s Constitutional rights.
39. Lastly, that the Petitioner lacks precision as to which human rights have been limited and or infringed and to what degree. On that basis, the Respondents urged this Court to allow the Preliminary Objection.

Interested Party’s Submissions

40. The interested party in opposition of the Preliminary Objection, submitted that for a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In support of this, reliance was placed in the Court of Appeal case of Mukisa Biscuit manufacturing. Co. Ltd Vs West End Distributors ltd (1969) EA 696.
41. Consequently, it was submitted that the objection as filed is not a Preliminary Objection so called. He argued that a preliminary objection must stem and germinate from the pleadings filed by the parties and must be based on a pure point of law with no fact to be ascertained, as stated in the case of Avtar Singh Bhamra & Another vs Oriental Commercial Bank Kisumu HCCC No .53 of 2004 .
42. Regarding the first ground of the Preliminary objection, the Interested party argued that the petition herein does not in any way seek determination of the proprietorship of the land where the hospital is situated and the claim that this petition falls under the provisions of Section 13 of the *Environment and Land Court Act* cannot hold any water.
43. It was argued that a Constitutional petition as provided for under Article 23 (1) of Constitution and the Mutunga rules expressly provide that this Court has unlimited jurisdiction to determine such violations of rights and freedoms in the Bill of Rights. Conversely, that a petition in the ELC court is limited to the provisions under Articles 42, 69 and 70 of Constitution, when the petition filed before this Court goes beyond the provisions of Articles 42, 69 and 70 of *the Constitution*, hence, cannot be entertained by the ELC court. Therefore, it is rightfully before this court as expressly provided under Article 23 (1) of *the Constitution*.



44. On the claim that the petition is sub-judice, the interested party, submitted that the principle of sub-judice is defined in Section 6 of the Civil Procedure Act as follows: -

“No Court shall proceed with the trial of any suit or proceeding on in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or another Court having jurisdiction in Kenya to grant the relief claimed”

45. On the contrary, that in this case, there are facts in dispute which the Court has to determine in seeking to arrive at the holding whether or not the application herein is sub-judice. Further that the parties are different and so is the cause of action. That whereas this case is a constitutional petition, the Nyandarua case is a case on trespass filed in the ELC court by way of a plaint.

46. As a result, that for the Court to determine whether the application is caught by the principle of sub-judice, evidence has to be adduced and a mini trial conducted in seeking to establish whether the issues raised in the two cases are the same or not. In support of this view reliance was placed on the decision by Munyao Sila, J, in *Leputei Ole Koros & Another -V- Attorney General and 3 others* [2016] eKLR where he stated:-

“Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.”

47. Further reliance was placed on the case of *A.K.N. -V-JNM* [2014] eKLR where W. Musyoka J stated; -

“This court is of the considered view that the issues raised in the Preliminary Objection herein are of a nature that would apparently require calling of evidence, it raises questions of fact and law in regard to which both the Applicant and Respondent are in several respects in disagreement...A party, who raises a Preliminary Objection, must do so only on a pure point of law and nothing else.”

48. Lastly, it was argued that the nature of the suit pending before Nyandarua ELC court is substantially different from the nature of the Petition herein which is filed on behalf the Nakuru County residents in the realm of public interest litigation. There is no commonality of parties, cause of action or relief to form a basis for the holding that the doctrine of Sub-judice should apply.

49. Arising from the foregoing, the Interested party urged this court to dismiss the Preliminary Objection for lacking in merit.

Analysis and Determination

50. On the threshold to be met in Preliminary Objection, the Supreme Court in *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR restated the principles in the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696:

“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...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”.

51. Thus, a Preliminary Objection may only be raised on a ‘pure question of law’ and to do so, the Court has to be satisfied itself that there is no proper contest as to the facts. The facts are deemed agreed, as they are presented in the pleadings on record.
52. On sub judice rule, the 1st and 2nd Respondents argued that the current petition is sub judice to Nyandarua ELC Case No. E003 of 2024 on the grounds that the Parties are similar, the subject matter is the same, hence, this Petition is in violation of Section 6 of the Civil Procedure Act.
53. For emphasis, the doctrine of sub judice is established in Section 6 of the Civil Procedure Act which provides that: -

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
54. On that doctrine, the Supreme Court in Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR stated:-

“The term sub judice is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
55. In order to determine whether a suit is sub judice as stated above, the Court has to be acquitted with both suits to appreciate the parties in each case, the prayers sought and competence of the Courts.
56. This Court would need to peruse through the Nyandarua ELC case to enable it analyse the facts of the case in order to determine whether the parties are the same, the causes of action are similar and both Courts have jurisdiction to handle the issues. That therefore remove the issue from a pure point of law as contemplated in the Mukisa Biscuits case (supra).
57. Moreover, this Court has not been furnished with the pleadings in Nyandarua ELC No. E003 of 2024 to enable it determine whether this Petition herein is sub judice. Therefore, the Preliminary objection base on the principle of sub-judice is unsupported and without merit.



58. On jurisdiction, it is settled that Jurisdiction is everything and without it a court must down its tools as was settled in the celebrated case of Owners of Motor vessel Lilian “S”(supra) that:-

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority.”

59. Section 13 of the *Environment and Land Court Act* cited by parties herein provides that:-

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

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

60. It is notable that Section 13 (3) above empowers the ELC court to handle all violations or infringement of rights and freedoms in relations to clean and health environment. The limitation of the jurisdiction of the ELC in handling violation of rights and freedom was elaborated in the case of Patrick Musimba case (Supra), where the 5 Judge bench of the High Court held that:-

“Parliament clothed the ELC with jurisdiction to deal with constitutional matters touching on a clean and healthy environment only but not other constitutional matters, including matters touching on other fundamental rights.”

61. In Daniel N Mugendi (supra), the Court was of the view that; -

“...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.”

62. In essence, the Court of Appeal allowed the ELC Court to hear and determine alleged infringement of rights involving land and environment and not environment alone as expressly provided by the Act.

63. As discerned from this Petition, the following reliefs are sought;-



- a) A declaration that the process, manner and the decision in which the 1st Respondent by herself, her agents, servants and/or employees forcefully entered the Interested Party's land known as LR NO NAKURU_ MUNICIPALITY BLOCK 11/107 formerly LR NO. 451/1246 herein and took possession and control thereof was unconstitutional, illegal, embarrassing to Kenyans and a constitutional coup hence null and void.
 - b) A declaration that the 1st Respondent is not a fit and proper person with due regard to her honesty, personal integrity, dignity, respect for the rule of law, respect for human dignity, public good and governance as well as constitutionalism, thus unsuitable to hold public office either as a Governor of Nakuru County or any other public position.
 - c) Any other order this Honourable court may deem just and expedient to grant.
64. It is the reason that the Respondents argued that the issues raised herein relate to the alleged illegal possession and occupation, which are issues that arise from trespass that are rooted in ownership issues and thus within the mandate of the Environment and Land Court.
 65. The Petitioner on the other hand maintained that the ownership of the subject land is not in issue in this petition, rather that the conduct of the 1st Respondent, which is unbecoming of a person of her calibre and stature.
 66. The Petitioner argued that they are only concerned with the violations of the rights and freedoms of the 1st Interested party's staff, patients and general public in the way in which the 1st Respondent took over the suit property, by use of goons, without regard to the lives of the patients, staff, and the general public.
 67. Its argument was that in taking over the premises forcefully, the 1st Respondent violated the patients, staff and general public rights to human dignity, equity, social justice, equality, non-discrimination, right to access the highest attainable standard of health care services among other rights.
 68. It is notable that the Petitioner questions the process and manner in which the 1st Respondent entered into the Interested Party's premises and a took possession and control. Indeed, the first prayer seeks declaratory order against the process and the manner in which the 1st Respondent took possession. The Petitioner it "unconstitutional, illegal, embarrassing to Kenyans and a constitutional coup hence null and void."
 69. The Petitioner therefore alleged violations of human rights and freedoms in the said process. The infringement of those rights is illustrated at paragraph 33 of the Petition thus:-
 - i. That the 1st Respondent has grossly violated the Patients and staff at the Interested Party' facility as well as the General Public's right to human dignity, equity, social justice, equality, non-discrimination, and the right to access the highest attainable standard of health care services contrary to Articles 10, 19, 26, 28 and 43(1)(a) of *the Constitution* of Kenya, 2010.
 - ii. That the 1st Respondent has failed to discharge her fundamental duty as espoused under Article 21(1) of *the Constitution* of Kenya, 2010, by, in collusion with her hired goons, illegally and forcefully gaining entry into the Interested Party's premises and taken control thereof, chasing all patients and staff in an illegal attempt to take possession and control of the Interested Party's premises which led to premature loss of lives.
 - iii. That the 1st Respondent contravened the provisions of Article 29(c), (d) and (f) of *the Constitution* of Kenya, 2010, by threatening all patients, staff at the Interested Party's facility and



the general public's personal security either by herself, her agents, servants, employees and/or her hired goons without any reasonable cause.

- iv. That the 1st Respondent by herself, her agents, servants and/or agents violated the provisions of Article 162 (2) (b) of *the Constitution* as read with Section 80 of the *Land Registration Act*, 2012 by purporting to order the 3rd and 4th Respondent to cancel the Interested Party's Certificate of Lease thus putting the lives of all patients and staff at the Interested Party's facility and the general public in danger.
- v. That the 1st Respondent either by herself, agents, servants and/or employees, violated the provisions of Article 67 and 248 (2)(b) of *the Constitution* of Kenya, 2010 as read with Section 120 of the *Land Act* N 0.6 of 2012 by usurping the powers of the 4th Respondent and proceeding to forcefully and/or compulsorily acquire the suit land and by extension the Suit premises.
- vi. That the 1st Respondent violated the provisions of Article 40 and 64 of the (vi) *constitution of Kenya, 2010* by forcefully and illegally gaining entry into the interested Party's premises notwithstanding that the same is a hospital providing essential services and physically took possession without following the due process as by law provided and required.
- vii. That the 1st Respondent's conduct either by herself, her agents, servants and/or employees thus fell short of the requirements under Chapter SIX of *the Constitution* on Leadership and Integrity and in particular by subverting the rule of law, violating human dignity and good governance as hereunder:
 - a. Through blatant disobedience of court orders issued on 31st October, 2023, 24 November, 2023 in Nakuru ELC Case No 36 of 2023 which led to the recusal of two Environment and Land Court judges, Hon. (DR) M.A. Odeny and Hon. A. Ombwayo.
 - b. Refusing, failing and/or neglecting to follow laid down statutory processes and procedures on cancellation of the Interested Party's parcel of land known as LR No Nakuru Municipality Block11/107 formerly LR No.451/1246.
 - c. Colluding with the 3rd Respondent either in influencing and/or manipulating the cancellation of the Interested Party's Certificate of Lease and title thereof for LR No Nakuru Municipality Block11/107 formerly LR No.451/1246, issued on 23rd April, 2021.
 - d. Wilfully and deliberately occasioned premature loss of lives of patients.
 - e. Violated the right to privacy, civility and common decency of the inpatients as well as out-patients and members of the public that accompanied their loved ones and/or were consulting.
 - f. Threatened the right to life of new born babies as well as those in neonatal intensive care unit (NICU).
 - g. Threatened the well-being of mothers-to-be that had been booked for delivery both for normal and C-Section delivery.
 - h. Ruled by the fist for personal and selfish interest and gain subjective to the public interest and good thus demonstrating a clear lack of respect for the people and bad governance.



- i. Occasioned premature loss of jobs of approximately 260 employees of the Interested Party and exposed the Interested Party to claims by suppliers thus miserably failed to provide good governance.
70. In addition, the Petitioner questions suitability of the 1st Respondent to hold office in light of the alleged violation of human rights and freedoms.
 71. Even though the root cause of this Petition is in relation to ownership of the parcel of land Reference No. Nakuru Municipality Block 11/107 (Formerly LR No. 451/1246), it is evident that the Petition is alleging the violation of rights of persons within the suit premises patients, staff and general public by the manner in which the 1st Respondent took over the occupation and possession of the property allegedly owned by the Interested Party.
 72. The predominant issues herein in this petition are not about the right to ownership and use of the suit premises as contemplated under Section 13 of the Environment and *land Act*. Consequently, this Court is satisfied that it has the jurisdiction to hear and determine the issues in regard to the alleged violation of the Rights and Freedoms as enshrined in *the Constitution* and as pleaded in the Petition herein.
 73. From the foregoing, the Preliminary Objection raised herein is not pure a point of law which can dispose of this Petition as illustrated in Mukisa Biscuits case (supra).
 74. Further, and in the circumstances herein, the 1st and 2nd Respondents' proposal for stay of the Petition until the Nyandarua ELC E003 of 2024 is heard and determined is not necessary unless all parties herein are willing to enter into a consent to that effect.
 75. In conclusion therefore:-
 1. The Preliminary Objection dated 2nd of May, 2024 is hereby dismissed.
 2. No orders as to Costs.

DATED, DELIVERED AND SIGNED AT NAKURU THIS 25TH DAY OF JUNE, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mrs. Mukira for Petitioner

Ms. Misiati h/b for Prof. Tom Ojienda SC for 1st & 2nd Respondents

N/A for the 3rd & 4th Respondents

Mr. Kahiga for Interested Party

Kamau - Court Assistant

