



Mulei v Munguti (Civil Appeal E083 of 2024) [2025] KEHC 11635 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E083 OF 2024

EN MAINA, J

JULY 31, 2025

BETWEEN

DAVID MULEI APPELLANT

AND

RODAH KAMENE MUNGUTI RESPONDENT

RULING

1. This is a ruling on the preliminary objection dated 19th September, 2024. According to the Respondent this court does not have jurisdiction to hear disputes and appeals on the use, occupation and title to land and this appeal is in this court in clear disregard of the above principles and is an abuse of the court process.
2. The appeal arises from a ruling of the lower court dated 7th March 2024, which struck out the Plaintiff, now Appellant's suit, for lack of jurisdiction following a preliminary objection filed by the Defendant (Respondent) herein. The reasons given by the court below for striking out the suit, were that the property whose title was sought to be cancelled was situated in another jurisdiction but not in Kangundo where the suit had been filed; that there was another similar case filed in the Environment and Land Court (ELC) in Machakos and that the suit in the ELC having been filed earlier should be heard first. Being aggrieved by the ruling and order to strike out the suit the Appellant preferred this appeal.
3. The preliminary objection was canvassed through written submissions and I have carefully considered the submissions, the cases cited and the law. It is trite that when considering which court, between the High Court and the Environment and Land Court, has jurisdiction in a matter, the court looks at the dominant issue in the case. This is what the Court of Appeal referred to as the dominant issue "or predominant test" in the case of Pumwani Riyadha Mosque Committee & Another v Gikomba



“(29) Although Counsel for the appellants appeared to suggest that the learned Judge erred in using the “predominant test” principle to determine that he had jurisdiction to deal with the dispute between the parties, we find counsel’s submission to be without merit for it was in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna* (supra) that the Court applied the principle of the “dominant issue” to aid judges of the High Court and the specialized courts in determining whether a matter fell within a particular court’s jurisdiction or that of any of the other courts of equal jurisdiction. The “dominant issue” principle or the “predominant test” principle as referred to by the learned Judge is therefore a recognized principle and the learned Judge cannot be faulted for invoking it.”

4. Applying the predominant test in the *Pumwani Riyadhha Mosque Committee & Another v Gikomba Business Centre Limited* (supra) the Court of Appeal came to the conclusion that issues concerning lease agreements fell within the Environment and land Court but not the High Court. The court, in distinguishing land use and contracts touching on land, stated:

“(34) The definition of land use was given judicial footing in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna* (supra) thus:

35. Accordingly, for 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. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use

.....

37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always



be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.”

- [35] In essence, land use can simply be defined as activities practised on land to yield economic or social benefits. Additionally, it is important to appreciate that among the powers donated by section 13(2)(a) of the Environment and Land Court Act to the Environment and Land Court is the authority to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
- [36] Having established the foregoing, a review of the plaint and the lease agreement will determine whether the dispute fell within the provisions of section 13 of the Environment and Land Court Act or otherwise. Through the agreement in question, the respondent leased the suit property from the appellants for economic activities and agreed to pay the appellants a monthly rent in consideration of occupation and use of the suit premises. From the plaint, some of the alleged particulars of breach are “interfering with the business operations of the respondent and violation of the terms of the lease agreement.” Additionally, one need not look further than Part 1 of the lease agreement and paragraphs 6-11 of the plaint to conclude that the lease agreement concerned the use of the suit property and the respondent’s tenure thereon. Unlike in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna* (supra), where the land was being used like a chattel to secure a loan from a bank, in the instant matter, the respondent had leased the land and put up structures thereon for leasing out. The land was therefore being used in the terms contemplated by Article 162(2)(b) of the Constitution, and the dispute arising from the lease agreement between the parties squarely fell in the province of the Environment and Land Court. That being the case, we must respectfully disagree with the learned Judge’s finding on jurisdiction. In our view, the dispute herein is one which fell within the jurisdiction of the Environment and Land Court pursuant to the provisions of Article 162(2)(b) of the Constitution and section 13(2)(a) of the Environment and Land Court Act.”

5. Before that the court had come to the conclusion that what constitutes land use “is 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..... a disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use.....” (see the case of *Cooperative Bank of Kenya limited v Patrick Kangethe Njuguna & 5 others* [2017] KECA 79 (KLR).
6. Applying the above principles to this case it is clear that the preliminary objection has no basis as the dominant issue in the court below was breach of the agreement for sale of land between the parties and had nothing to do with the use of land.
7. The upshot is that the preliminary objection is dismissed with costs to the Appellant and the Appeal shall be heard in this court.



Orders accordingly.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY 2025.

E.N. MAINA

JUDGE

In the presence of:

Ms Kerima the Appellant/Respondent

Ms Ngulukyo for the Respondent/Applicant

Geoffrey - Court Assistant

