TOPIC: ADJUDICATING LAND DISPUTES IN A RAPIDLY CHANGING SOCIAL, ECONOMIC AND POLITICAL ENVIRONMENT

Dr. Wamuti Ndegwa (PhD Law UON)

December, 4th 2019

University of Nairobi
# TABLE OF CONTENTS

Contents

TABLE OF CONTENTS .................................................................................................................. 2

LIST OF CASES .......................................................................................................................... 4

LIST OF ABBREVIATIONS .......................................................................................................... 6

ABSTRACT .................................................................................................................................. 8

ADJUDICATING LAND DISPUTES IN A RAPIDLY CHANGING SOCIAL ECONOMIC AND POLITICAL ENVIRONMENT ......................................................................................... 9

Introduction .................................................................................................................................. 9

Part One ...................................................................................................................................... 9

The Change in Anatomy of Land Disputes .................................................................................. 9

The years 1970’s and 1980’s ........................................................................................................ 9

The 1990’s to around 2000’s ....................................................................................................... 10

Year 2000 onwards .................................................................................................................... 11

Forgery, false documents and tampering with records ............................................................ 12

Extortion Using Ex-Parte Injunctions upon Fabricated Claims .............................................. 14

Violent Dispossessions Involving Politicians ......................................................................... 16

Conclusion on the Change of Anatomy of the Disputes .......................................................... 16

Part Two ..................................................................................................................................... 18

CHALLENGES FOR ELC ADJUDICATION ............................................................................. 18
Undue Exclusion of Criminal Offences from the Jurisdiction of ELC ........................................... 18
Inappropriate Overriding Objectives .................................................................................................. 22
Culprits Are Omitted From the Adjudication ..................................................................................... 24
Adversaries in ELC Adjudication Are Equally blameless .................................................................... 24
Inappropriate Tools and Inadequate Resources ................................................................................. 27
Part Three .............................................................................................................................................. 29
Adjustments Needed To Match Adjudication to the Challenges ....................................................... 29
Fitting the Suggestions in the Legal Framework of ELC ................................................................. 30
Exercise Jurisdiction over Criminal Offences Relating or Concerning Environment and Land
................................................................................................................................................................. 30
Propriety of imposing criminal law sanctions for E & L proceedings .............................................. 34
Adopt the criminal justice system as alternative dispute resolution mechanism for crime based
disputes ....................................................................................................................................................... 37
Hold Land Registrars and Others Personally Liable In Damages ..................................................... 38
Rebalance the Terms of Injunctions to Protect Respondents ............................................................. 41
Utilise the Resources of Criminal Justice System ............................................................................... 43
Employ Law on Contempt of Court Widely ......................................................................................... 44
Conclusion ............................................................................................................................................... 44
LIST OF CASES

Abdalla Sharrif v Independent Elections and Boundaries Commission........................................ 38

Amirali Hassan Ali Mohammed & Another v John O Nyaganga Alias Joseph O Nyaganga..... 14

Chandra Shashi v Amil Kumar Verma........................................................................................................ 43

Charity Mpano Ntiyione v China Communications Construction Company Limited & National Environment Management Authority................................................................. 17

East African Railways Corporation v Anthony Sefu............................................................................. 31

Elizabeth Wambui Githinji & 28 others v Kenya National Highway Authorities & Attorney General................................................................................................................................. 25

Engel v Netherlands................................................................................................................................. 19

Evenson Jidraph Kamau Waitiki v Kenya Power & Lighting Company Ltd................................. 18

Francis Nyaga Njeru v China Road and Bridge Corporation and ARJ Capital............................. 36

Fredrick Otieno Outa and 4 others........................................................................................................ 35

Group Link Ltd & Others v Lucas Owiti & 4 others................................................................. 14

In the Matter of National Land Commission..................................................................................... 11

James Mulinge v Freight Wings Ltd & 3 others.............................................................................. 43

Jennifer Joy Pleasance v Jephason Maina Karoki & 5 others....................................................... 13

Joshua Chelelgo Kulei v Republic & 9 others................................................................................. 11
Kasimu Sharifu Mohamed v Timbi Limited.................................................. 15

Kuria Kiarie & 2 others v Sammy Magera............................................. 22

Leisure Lodge limited v Commissioner of Lands and 767 others.................... 40

Mombasa Technical Training Institute v Agnes Nyevu Charo & 108 others........ 17

Moses Masika Wetangula v Musikari Nazi Kombo and 2 others....................... 34

Muhambi Kalinga & 4 others v Mahmood Hassam, Hussein Dairy Limited & 4 others...... 18

Mutanga Tea and Coffee Company Ltd v Shikara Ltd & Anor.......................... 27

Nelson Kazungu Chai & 9 others v Pwani University College.......................... 12

Republic v Karisa Chengo & 2 others..................................................... 30

Republic v Kenya Ports Authority & another Ex-parte Makupa Transit Shade Limited Mat International Limited.......................................................... 16

Republic v Thomas Mokaya Akara...................................................... 22

Robert Wamithi v Juma Masaudi Omari............................................. 15

Rockland Kenya Limited v Eliot White Willer........................................ 42

Sunrise Orthopedic & Trauma Hospital Ltd & Another v Lectary Kibor Lelei & 2 others...... 11

William Kinyanyi Onyango v IEBC and 2 others..................................... 35

Zahira Habibullah Sheikh v State of Gujarat........................................... 43
LIST OF ABBREVIATIONS

ADR – Alternative Dispute Resolution

AG – Attorney General

CPA – Civil Procedure Act

CRBC – China Road and Bridge Corporation

CS – Cabinet Secretary

DCI – Directorate of Criminal Investigations

DPP – Director of Public Prosecutions

EACC – Ethics and Anti-Corruption Commission

ECHR – European Court of Human Rights

EL – Environment and Land

ELC – Environment and Land Court

Ex. p – Ex parte

FIDIC – Fédération Internationale des Ingénieurs-Conseils

IEBC – Independent Electoral and Boundaries Commission

KNHA – Kenya National Highways Authority

MCA – Member of County Assembly

NEMA – National Environment Management Authority
NLC – National Land Commission

NPS – National Police Service

ODPP – Office of the Director of Public Prosecutions

PC – Penal Code

SGR – Standard Gauge Railway
ABSTRACT

This paper discusses the challenges in adjudicating land disputes in the rapidly changing social economic and political environment. It starts by observing that in the last 40 years, the anatomy of land disputes has changed from bona fide civil disagreements to criminal activities such as forging title documents, violent evictions, and extortion using the court process. In the second part, the paper highlights the challenges created by the change of anatomy. Some of the challenges include lack of jurisdiction over the criminal offences, inappropriate overriding objectives, and absence of the real culprits at the civil proceedings, equally blameless parties in the proceedings, inappropriate tools, and inadequate resources.

To overcome the challenges the paper suggests that the ELC should reclaim its otherwise rightful jurisdiction over crimes that relate to or connected with land and environment. Second, the overriding objective of the ELC should be broadened to cover preventing the EL crimes. Third, the ELC may adopt or co-opt some tools of the criminal justice system. Fourth, Land Registrars and other Government officials implicated in the crimes should be held personally liable to compensate their victims so that the innocent are held harmless. With respect to extortion using ex parte injunctions, the paper proposes that the conditions for giving injunctions be recalibrated to protect the legal rights and interests of the respondent developers and investors.

The final part demonstrates that the proposed adjustments fit well in the current legal frame work of ELC. In the process of fitting, the paper demonstrates that there are no valid conceptual, constitutional, statutory, or operational justifications for denying the ELC the primary and appellate jurisdictions to try criminal offences relating to or concerning land and environment.
ADJUDICATING LAND DISPUTES IN A RAPIDLY CHANGING SOCIAL ECONOMIC AND POLITICAL ENVIRONMENT

Introduction

This paper discusses the challenges in adjudicating land disputes in the rapidly changing social economic and political environment. It starts by observing that in the last 40 years, the anatomy of land disputes has changed from bona fide civil disagreements to criminal activities such as forging title documents and forceful evictions. In the second part, it highlights the challenges created by those changes. In the third part, it identifies the adjustments that may be needed to align the adjudication process to the challenges. The fourth and final part attempts to fit the proposed adjustments within the current legal framework of ELC. Along the line, the paper questions the common conception that there are valid conceptual, constitutional, statutory, or operational justifications for denying the ELC the primary and appellate jurisdictions to try.

Part One

The Change in Anatomy of Land Disputes

In this part, the paper discusses the changes in the legal character of the disputes from the 1970s to year 2019.

The years 1970’s and 1980’s

In the 1970’s and 1980’s the bulk of land disputes arose from encroachments across boundaries, botched up succession, failed agreements of sale, and trespass to land by animals. Neighbors would accuse each other of pushing the boundary fence by barely a foothold. Others would plant stones on their side of the seasonal stream marking the boundary so as to change the course of the stream and thereby add a foot or two to their side of the land. The boldest would just uproot and
relocate surveyor beacons. In land disputes arising from botched succession, a sibling tired to disinherit the other or doubtful relatives claimed share of estate. Cases of abortive agreements of sale presented the more serious land disputes. Often, it would be purchasers in possession denied title. Other sources of land disputes were trespass to land involving cattle or goat entering into the shamba of another and destroying crops. It was rare to hear of disputes arising from environment issues *per se*. The right to a clean and healthy environment was largely unknown.

**The 1990’s to early 2000**

Between 1990’s and early 2000, a new type of land dispute gained prominence. The underlying activity was primarily the land officers allocating public land to two or more persons\(^1\). It came to be known as double and multiple allocations. The allotees would all have letters of allotment signed by the same officer at the Ministry of lands allocating them the same piece of land\(^2\). The name Wilson Gachanja then the Commissioner of Lands was quite common in those disputes\(^3\). Around the same period, there arose another type of land disputes which involved Government officers allocating land *reserved* for public amenities such as schools\(^4\), police stations\(^5\), public toilets\(^6\), government houses\(^7\), law courts\(^8\), government forest to private persons\(^9\). The trend was

---


2 Ibid

3 *Joshua Chelelgo Kulei v Republic & 9 Others* [2014] eKLR.

4 *In the matter of the National Land Commission* [2015] eKLR.

5 Ibid

6 Ibid

7 Ibid

8 *Sunrise Orthopedic & Trauma Hospital Ltd & Another v Lectary Kibor Lelei & 2 others* [2019] eKLR.

commonly known as land grabbing. When issuing the ultimatum to evict persons living and claiming to hold title deeds over Mau Government Forest, the Cabinet Secretary for Environment gave notice that Government officials who hives off 14,000 acres from the forest and purported to sell it to members of the public would be arrested and prosecuted. Insisting that the Government would not compensate those purporting to hold titles, the Cabinet Secretary said that the persons who sold the land committed crimes and the mere fact that individuals hold titles signed by Government official does not validate and invalid process.

**Year 2000 onwards**

From around year the 2000 to date, the country encountered new types of environment and land disputes. The most prevalent types were those arising from pure crimes such as forged title documents, extorting monies from developers using fabricated claims in court, and violent disposessions. This development may be explained by the fact that around year 2002, the government took measures to prevent illegal acquisition of public land. Some of the measures included a Presidential decree banning authorities from issuing letters or other documents to allocate or otherwise alienate public land to private persons. The closing of that loophole of illegally acquiring public land may have forced criminals to turn to private land. The categories of the new land disputes are discussed in detail here below.

---


12 Samuel Owino “Big Fish involved in Mau plunder to be arrested” *The Nation News*, 11 (September 11, 2019)

13 *Nelson Kazungu Chai & 9 others v Pwani University College [2017]* eKLR
Forgery, false documents and tampering with records

The land disputes arising from crime involve persons using false identity, making false title documents and purporting to sell and transfer the land of another in the name of that other person, without the knowledge and or consent of that other. The criminal may transfer the land to his fictitious name before transferring it to the innocent third party or he may bypass himself and transfer from the name of the bona fide owner directly to the third party. In either scenario, the false identity used by the culprit to sell and transfer makes it difficult to identify or sue him. The false identity name of the culprit may feature in the ELC dispute but it represents a ghost party since the names are certainly not the names of the culprit and the culprit may remain unknown. Nevertheless, it is evident in most cases that some officers in the land registry by acts of commission and omission assisted, colluded, abetted, conspired in, or otherwise facilitated the fraud. Attempts by the Government to control the vice by requiring sellers to affix their passports size photos on the transfer forms bear little fruit because the criminals affix false photographs extracted from the death announcements in newspapers.

The upshot is that the bona fide owner retains his original title deed without a clue that his land was sold and transferred to others. In related criminal activities, the officers at the Land Office including the Land Registrars simply remove the genuine records including the green cards and replace them with others bearing false entries. The history of the ownership of the land is thereby erased.

These activities are essentially criminal since making false documents and tampering with records of the Lands Registry are criminal offences under section 157 of the Land Act No. 6 of 2012. Under the Land Act, the offences are punishable by a fine of Kshs 10 million or 10 years

---

14 Jennifer Joy Pleasance v Jephason Maina Karoki & 5 Others [2017] eKLR
prison term or both. There are also provisions in section 103 of the Land Registration Act under which it is punishable by a fine of Kshs 5 million or 5 years jail sentence or both. In the penal code, the conduct is criminalized by chapter XXXIV of the Penal Code which establish offences of forgery, coining, counterfeiting and similar offences. Sections 345-348 define forgery as the making false documents with intent to defraud or to deceive, making documents without authority and altering the documents. Section 349 provides that the general punishment for forgery is imprisonment for three years. There is a host of other provisions in other statutes criminalizing the conduct.

Other criminals use the Court process including the ELC to commit the crimes that generate the land disputes. The targeted land is intentionally included in sham succession proceedings. The succession court is duped to issue orders to transfer the land to another as part of distribution of the estate of deceased. The deceased may be real or fictitious\(^\text{15}\). For land registered in names of companies, the fraudsters simply make their own certificate of incorporation and CR -12 Form bearing false identities posing as the directors of the company. The fraudsters thereafter sell and sign off the transfer of land in the name of the company as the directors\(^\text{16}\). In other cases, the fraudsters deliberately short circuit the court process by duping the court that they have served the defendant with the summons when fully aware that they haven’t. This mischief mostly occurs as sham adverse possession claims. The fraudsters institute the claim in the name of a clueless peasant. Come the time of serving the summons, they claim that they cannot trace the defendant for purposes of effecting personal service. They seek and obtain leave to serve the court summons, by substituted service often by registered post to the alleged last known address of the

\(^{15}\) *Amirali Hassan Ali Mohammed & Another v John O Nyaganga Alias Joseph O Nyaganga* [2018] eKLR

\(^{16}\) *Mombasa High Court Civil Case No 1180 of 2014 Group Link Ltd & Others v Lucas Owiti & 4others*. The defendants forged the certificate of incorporation and identity of directors of Vros Company Ltd (unreported)
defendant. Even in cases where the address is genuine, the mischief occurs since they send empty envelopes or blank papers\textsuperscript{17}. The whole idea is to obtain a certificate of posting. The certificate is then used in the affidavit of service to mislead the court that the defendant was duly served but failed to enter appearance or defended-parte proceedings, judgment, and decree ensue. The consequential ex-parte decrees are used by the fraudsters to sell and transfer the property to other parties\textsuperscript{18}.

**Extortion Using Ex-Parte Injunctions upon Fabricated Claims**

Another breed of disputes that is fairly new is extorting developers for huge sums of money using prolonged ex-parte injunctions stopping construction works. Those in this illegal business institute sham proceedings claiming ownership or some other interest in the land on which the development is taking place. At times, the claim is in the form of public interest litigation claiming environmental or public land rights. The extortionists and their agents lie in wait until the developer or contractor expends so heavily that he cannot afford to stop or abandon the project. The developments will normally be high end housing estates, shopping malls, and even government infrastructure projects. The private developers will have sold units or leased off plan, signed up with the contractor, mobilized the contractor, commenced construction works, and reached a significant stage of the works. The financing bank normally gives a short grace-period to the project to generate and repay the loan.

At this point, the extortion litigator then strikes using a fabricated claim filed under certificate of urgency. The extortionists have so perfected the art of fabricating claims that Judges are convinced to issue ex-parte injunction, conservatory order or kindred orders

\textsuperscript{17} Robert Wamithi v Juma Masaudi Omari [2008] eKLR

\textsuperscript{18} Kasimu Sharifu Moh-amed v Timbi Limited [2007] eKLR
restraining the developer from continuing construction works, selling, leasing, or in any other way interfering with the disputed land\textsuperscript{19}. The developer is then placed between a rock and a hard place. The contractor will normally demand hefty compensation from the developer as penalty for stoppage of works since the standard Contracts under Federation International Des Ingenieurs Conseils impose penalties to protect contractors where the contractor is unable to carry out the works through the fault of the developer\textsuperscript{20}. At the same time the persons who purchased units off plan demand damages for loss of use due to delay in completing and handing over. Placed in such difficult financial situation, the developers often choose to pay the extortionist plaintiff off irrespective of the merits of the claim to allow the project to proceed. Even the Government is not spared from these extortionist claims. For instance, it was reported that the company contracted to construct the Nairobi - Naivasha Standard Gauge Railway billed the Government of Kenya Kshs 21 million per day accumulating to Kshs 3 billion at as May 30, 2019 for idle workers and machines\textsuperscript{21}. The construction works were stopped by restraining injunctions issued by the ELC in various cases including \textit{Charity Mpano v China Communications Construction Company}\textsuperscript{22}. An injunction that was issued ex-parte on October 24, 2016 survived for 12 months until December 11, 2017 when it expired by operation of law\textsuperscript{23}. The blatant inappropriateness of the ex-parte injunction is demonstrated by the fact that ultimately the ELC struck-out the claim on account of

\begin{itemize}
  \item \textit{Republic v Kenya Ports Authority & another Ex-parte Makupa Transit Shade Limited Mat International Limited} [2014] eKLR
  \item Fidic, \textit{Conditions of Contract for Construction: For Building and Engineering Works designed by the Employer} at 33-34 (Multilateral Development Bank Harmonised Edn, June 2010)
  \item Daily Nation, Nation Media Group, Monday June 24, 2019 at page 1
  \item \textit{Charity Mpano Ntiyione v China Communications Construction Company Limited & National Environment Management Authority} [2017] eKLR
  \item Civil Procedure Act Order 40 rule 6 provides that in a suit in which an interlocutory injunction is not determined within a period of 12 months from the date of grant of the injunction, the injunction shall lapse unless the Court orders otherwise.
\end{itemize}
lack of jurisdiction and the decision was affirmed by the Court of Appeal. Such drawbacks to business contradict sharply with the advice of the World Bank that justice systems should act as facilitators of investments and growth and not as obstacles.

Violent Dispossessions Involving Politicians

In politics politicians including past, present, and aspiring Members of County Assemblies, Members of Parliament, Governors and others popularize themselves by organizing small scale mau-mau style violence and evict or otherwise dispossess bona fide land owners. The politicians then subdivide the land informally into small units and claim that they have settled their landless constituents. In most cases, politician profit by selling the land to the other persons even without formal transfers or title deeds or collecting from those purportedly settled on the land. Attempts to evict the goons and restore possession to the rightful owners are normally frustrated by politicians and goons using violence.

Conclusion on the Change of Anatomy of the Disputes

There is enough material to support the conclusion that between the 1970s and 2019, the anatomy of the land disputes has changed from disagreements arising from bona fide transactions to outright crime, extortion, and politics. In crime, the disputes arise from forgery, making false documents, and tampering with records particularity substituting original green cards for the

---

24 Charity Mpano Ntiyione v China Communications Construction Company Limited & another [2019] eKLR
26 Mau - Mau is a name of Organization formed in the 1950’s by native Kenyans that fought for land rights and to evict the colonial British Government from the Kikuyu land and Kenya as whole.
27 Mombasa Technical Training Institute v Agnes Nyevu Charo & 108 Others [2014] eKLR
28 High Court Mombasa No. 298 of 2013 (OS) Muhambi Kalinga & 4 others v Mahmood Hassam, Hussein Dairy Limited & 4 Others

29 Evanson Jidraph Kamau Waitiki v Kenya Power & Lighting Company Ltd [2017] eKLR
false/fake. In the extortion business, the extortionists obtain court injunctions based on fabricated claims and use them to unlawfully extract huge sums of money as ransom from developers. In politics, politicians organize and finance goons posing as squatters or otherwise landless people to violently dispossess bona fide landowners
Part Two

CHALLENGES FOR ELC ADJUDICATION

The change in the anatomy of the disputes raises challenges for the ELC in adjudicating the disputes. The challenges are both conceptual and operational.

Undue Exclusion of Criminal Offences from the Jurisdiction of ELC

The greatest challenge faced by the ELC is the misconception that the conceptual and legal framework of the ELC deprives it jurisdiction over criminal offences relating to or concerning land. The ELC is perceived as a civil court and its jurisdiction is understood to be the so-called civil proceedings relating to land and environment. This distinction is then understood to exclude jurisdiction to adjudicate criminal offences relating to the same land and environment. This is a misconception because other than the label parties assign to a dispute, there is no universally accepted conceptual, practical or other basis for distinguishing criminal from civil wrongs

Proceedings may be labeled criminal, civil or otherwise. As will be demonstrated shortly, labelling either way does not mean that either category has special features that distinguish it from the other in all cases and at all times. As Ashworth puts it, there is no general dividing line between criminal and non-criminal conduct. Consequently, as observed by Glanville, there is no universally accepted formula for distinguishing civil from criminal wrongs and proceedings. In fact to prevent governments from denying subjects the trial rights by mischievously designating proceedings as civil, the European Court of Human Rights held that the question whether proceedings are criminal is to be determined by the Court looking at all the

30 Smith and Hogan, Criminal Law at 12-14 (Oxford University Press 13th ed 2011)
31 Andrew Ashworth and Jeremy Horder, Principles of Criminal Law at 2 (Oxford University Press 7th ed 2013)
circumstances of the proceedings as opposed to just reading the label assigned by a statute\textsuperscript{33}. In the part below, the paper illustrates that the legal system in Kenya is no exception; it suffers the same lack of clear line between criminal offences and civil wrongs and consequently, no clear line between civil and criminal proceedings.

Crime and civil wrong cannot be distinguished on the basis of the facts constituting the conduct since the facts that constitute crime also constitute civil wrongs. For instance in matters of environment and land, tampering with the records of the Land Registry, making, and uttering forged documents are criminal under sections 157 of the Land Act and section 103 of the Land Registration Act. The conduct also constitutes civil wrongs of torts such as fraud. Consequently, the facts alleged to constitute criminal offence in the proceedings designated criminal are the same facts pleaded in the plaint in civil proceedings. The particulars of the offence in the charge sheet correspond to the particulars of fraud in the plaint.

Again, crimes and non-crime conduct cannot be distinguished on the basis of intrinsic immorality since the perceived immorality of the wrong cannot be the litmus test of what is or is not crime\textsuperscript{34}. In Kenya, conduct that may be morally condemned such as prostitution is not necessarily criminal\textsuperscript{35}. On the other hand conduct that has no moral connotations such as failing to renew the driving license is criminalized by section 30(1) and 41 of the Traffic Act.

The punitive character cannot conclusively distinguish criminal law from civil wrongs\textsuperscript{36}. It is widely assumed that the role of criminal law is to punish and deter the wrong doers while that of

\textsuperscript{33} Engel v Netherlands (1976) 1 EHRR 647.

\textsuperscript{34} Granville Williams, The Definition of Crime (1955) CLP 107

\textsuperscript{35} Alice Wamaitha Mwangi v Nation Media Group Ltd [2007] eKLR, Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019] eKLR

\textsuperscript{36} Smith and Hogan, Criminal Law at 4 (Oxford University Press 13\textsuperscript{th} ed 2011)
civil law is to compensate for violation of personal rights. This distinction again does not apply across the board because civil law is in various situations to punish and deter. The objective of exemplary damages in the tort of defamation and passing-off is basically to punish and deter. On the other hand, the objective of criminalizing certain conducts in regulatory statutes such as the renewing business permits and Town planning encourages compliance rather than to punish non-compliance. In most cases, the law enforcers abandon the criminal process as soon as the offender subsequently complies.

Another feature that is assumed to be a basis for distinguishing criminal from civil law is that criminal offences are enforced by the State while civil wrongs are enforced are enforced by private persons. This again is not the case in Kenya. Article 157 (12) of the Constitution provides that Parliament may enact legislation conferring powers of prosecution on authorities other than the DPP while section 28(1) of the Office of Director of Public Prosecutions Act provides that notwithstanding anything in the said Act or any other written law any person may institute private prosecution.

When it comes to the forum for enforcing criminal and civil wrongs, there is a misconception that there are courts that are strictly for criminal proceedings and others for civil. This again is not true. In Kenya, criminal offences are tried in Magistrates Courts. The only exception is murder and treason. However, the said Magistrates Courts also try civil cases. The judges of the High Court, Court of Appeal, and Supreme Court try both civil and criminal matters.

---

39 Steve Uglow, Criminal Justice at 30 (Sweet & Maxwell 2nd ed 2002)
Accordingly, there is no Court, Magistrate, or Judge of the High Court, Court of Appeal, and Supreme Court that can be designated as belonging to criminal or civil disputes. Therefore, neither the forum nor the presiding officer can be used to distinguish a matter as criminal or civil. A Magistrate Court, High Court, Court of Appeal, and Supreme Court is either criminal or civil depending on the label of the proceedings of the moment. Even the title of parties to the proceedings is not conclusive. In Kenya, the alleged wrong doer is referred to as the accused while in civil he is the defendant. In United States, the accused in criminal proceedings is referred to as the defendant while in civil, the wrongdoer is the Respondent\(^40\).

Further, the nature of materials used to establish liability in both civil and criminal cases cannot be used to distinguish. In Kenya, both civil and criminal liability must be established by evidence. In both, the relevance and admissibility of the evidence is governed by the Evidence Act. There are a few exceptions of course but the bulk of the Act applies across the board. Even the standard of proof cannot distinguish. Generally, the standard of proof in criminal cases is beyond reasonable doubt while in civil it is on a balance of probabilities. However, civil wrongs such as fraud must be proved far beyond the balance of probabilities\(^41\) while the standard of proof in some criminal issues such as admissibility of evidence in a trial within a trial is on a balance of probabilities\(^42\). Even trying criminal offences is not a preserve of the so called criminal courts. Contempt of court is by law a criminal offence yet civil courts including the ELC have jurisdiction to try, convict, and sentence to prison. On the other hand, courts trying civil cases try and establish criminal liability. Examples are election offences in election petitions and contempt.

\(^{40}\) Offices of the United States, Attorneys, Legal Terms Glossary, online at https://www.justice.gov/usao/justice-101/glossary (visited August 20, 2019)

\(^{41}\) Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR

\(^{42}\) Republic v Thomas Mokaya Akara [2017] eKLR
of court in civil cases. Even the nature of punishment is not fool proof. Whereas imprisonment is generally a consequence of criminal liability, judgment debtors who fail to satisfy civil liabilities stand a risk of being sent to prison under section 40-43 of the Civil Procedure Act. Never mind that it is called civil jail because in Kenya, jail is jail.

The long and short of this brief case study is that there is no conclusive criterion for distinguishing criminal and civil ELC proceedings.

**Inappropriate Overriding Objectives**

The second challenge is the misalignment between the overriding objective of the adjudicatory process of the ELC and the need to adjudicate crime based ELC disputes through a legal process that deters those committing the underlying crime. The ELC focuses on resolving the EL disputes while ignoring the more fundamental objective of avoiding or rather preventing the disputes. Legal systems exist not just for settling but more fundamentally for preventing disputes. The role of ELC in adjudicating disputes is explicit. The explicit function deals with what the ELC will do when the dispute arises. However, the ELC has other latent functions. Amongst the latent is carrying out its functions in a manner that gets people to order their activities in a manner that avoids the disputes. In short, prevent the criminal activities relating to ELC matters. Therefore, the ELC has to play the role of protecting the people and their property by forcing people to order their lives in a manner that prevents the disputes.

Unfortunately, 19(2) of the ELC Act provide that the ELC is bound by the Civil Procedure Act. Section 3 of the Civil Procedure Act provides that the overriding objective of the ELC proceedings is to enable the court to facilitate the just expeditious, proportionate and accessible

---

resolution of disputes governed by the Act. This is a problem because the criminal background of the dispute demands that the crime be deterred. Criminal conduct is not adjudicated; it is punished and deterred. This is because deterring crime by punishing is the prime objective of criminal justice system. Adjudicating the product of crime without deterring it by punishment or other effective methods encourages the criminal enterprise to generate more disputes for the ELC. The trend from the Judiciary performance evaluations show that though the performance of individual judges of ELC has improved dramatically in terms of the output of finalized cases, the total backlog of disputes is actually rising\(^\text{45}\). This paper acknowledges that the legal system in Kenya divides proceedings primarily between civil and criminal. It also acknowledges that the primary output of criminal proceedings is punishment by jail term or fine or both for those convicted. On the other hand, civil proceedings give private law remedies for violating private rights of the private parties in the dispute. The remedies are primarily declaration of rights, monetary damages, restitution, injunctions etc. Further, that disputes relating to land and environment are perceived to fall in the category of civil proceedings. This dichotomy is based on the ideal scenario where the investigative authorities detect, investigate, and prosecute every conduct in which there is evidence of criminality and it is in the public interest to prosecute. Therefore, one would expect the authorities to investigate and prosecute culprits in the disputes arising from making false documents, forgeries, political dispossessions and to an extent the extortionists in sham claims. However, the situation in Kenya is far from that ideal. Invariably, the authorities fail to meaningfully investigate, prosecute, or punish the culprits. From this insight, this paper contends that the ELC may have to redesign its adjudicatory process with a view to align its overriding objectives to fill the void of deterrence left by the inaction of the

\(^{45}\) Gazette Notice No. 12448 of 15\textsuperscript{th} December, 2017
criminal justice system. Further on, this paper will contend that the ELC may very well be vested with the jurisdiction to adjudicate criminal proceedings arising from criminal conduct relating to, title to or the right to occupy or use land or questions relating to use of the environment.

**Culprits Are Omitted From the Adjudication**

The third challenge is that the real culprits in the crime are not parties to the proceedings before the ELC Adjudication process ought to allocate blames, rights, and duties. However, in cases arising from forging documents and subsequent sale to third parties, the real culprits are rarely joined as defendants in the proceedings. Invariably, the culprits use false names. As demonstrated above, the names referring to the fraudster in proceedings before the ELC is in all probability the false identity. It is fictitious identity. At the same time, the individual Land Registrars and other officials who tampered with the records at Land Registry are not parties to the proceedings. Only the Office of the Land Registrar issued. The culprit individual officer is not sued in his private capacity. So he escapes both the civil and criminal sanctions. The situation is not much different in proceedings of disputes arising from political dispossessions. The parties to the proceedings rarely include the politician who organized the violence or the goons who dispensed it. The non-joinder and misjoinder occasions gross miscarriage of justice the good will and competence of the judicial officer notwithstanding. At the minimum, the real wrongdoer escapes the civil sanctions of ELC.

**Adversaries in ELC Adjudication Are Equally blameless**

The forth challenge is that on the other hand, the parties in the proceedings before the ELC are both largely innocent. In *Elizabeth Wambui Githinji & 28 Others v Kenya National Highway*

---

Authorities and Attorney\textsuperscript{47}, the homes of the appellants were set to be demolished on account of being built on public road reserve. The appellants argued that they bought the disputed pieces of land from the previous owners after conducting due diligence and being satisfied that the land belonged to the then registered owners. Further, that before building, they obtained approvals from all relevant regulators including the then City Council of Nairobi and National Environment Management Authority. On the other hand, the Respondents argued that the land in question was public land already acquired by the Government through compulsory acquisition in the 1970’s for construction of a public road. Further, that the fact that the land was reserved for construction of an 80 meter wide highway was well captured in the survey maps which are public documents. The Kenya National Highways Authorities demonstrated that the sellers subdivided land reserved for the road for which they had been compensated by the Government. That thereafter, the said sellers illegally processed titles for the road reserve and sold to the appellants. Therefore, that the land was not protected under article 40(1) of the Constitution. However, there was no evidence that the appellants did anything or failed to do anything to suggest that they knew of the fraud of the vendors in selling to them land for which had passed to the State after the compulsory acquisition. The Court of Appeal noted that the Appellants were unwitting victims of the sellers and the surveyors who prepared subdivision plans on land that vested on the State upon the compulsory acquisition. While Justice Odek found that the land was public land and the appellants were not protected under Article 40. Justice Sichale and Ouko held that the Appellants were innocent purchasers for value without notice and entitled to the protection. The court issued an injunction restraining the Respondents from demolishing the properties without compensating the appellants. Cleary both parties were blameless and equally innocent since the Respondents

\textsuperscript{47} [2019] eKLR.
had compulsory acquired and compensated the previous owners while the Appellants were innocent purchasers. This scenario is replicated in cases where land belonging to private persons is sold to equally unsuspecting buyers without the knowledge and or consent of the registered owner.

The former registered owner whose title was forged and the land sold without his knowledge or consent is innocent. So is the purchaser who bought the land from the criminal again without any contributory guilty knowledge. The adjudication by ELC must award the land to either. In most cases, the guilt of the purchaser is limited to some elements of negligence in failing to notice the telltale signs of fraud such as unreasonably low price or other due diligence. However, it is rare for the purchaser before the court to have had outright knowledge that the seller had no right to sell. Both are innocent or substantially so but one must be condemned to lose the land. This is surely a challenge for a court of law to adjudicate because either way, an innocent man must be condemned to lose either the land or the money and pay the cost of so losing.

With respect to the unlawful business of extorting money using injunctions in sham claims, the adjudication falls short to the extent that it is not able to protect the victims of extortion. The ransom seeker is able to abuse the court injunction to stall projects, inflict losses, extract the ransom and walk away without penalty or compensating. He leaves the developer to take the losses in bank interest, penalty from contractors for stoppage of works, idle labor, and at times damages for delayed completion to off plan-purchasers and other contracts.\(^48\)

Overall, the adjudication process of ELC fails. Its objective is not aligned to the crucial objective of deterring underlying crime that generates the EL disputes. The adjudication uses

\(^{48}\) *Mutanga Tea and Coffee Company Ltd v Shikara Ltd & Anor* [2015] eKLR
inept tools. Failing to join the culprit forgers, conspirators Officers of the Land Registry, inciting politicians and their violent goons and other wrong doers leaves them unscathed. At the same time, it condemns the innocent victims of fraud while failing to meaningfully protect the innocent victims of political dispossession and extortionist injunctions.

**Inappropriate Tools and Inadequate Resources**

The fifth challenge is that the resources, tools, procedures, and remedies for the ELC are not designed to adjudicate disputes arising from conduct that is essentially crime, organized abuse of court process, and violent politics. With respect to crimes of forging title documents, the ELC and the parties before it do not have the technical equipment and the expertise for detecting forged and false documents. Detecting forged document or hand writings requires expert document examiners, hand writing experts, and forensic laboratories. Harrison says that where laboratory examination of documents is needed to carry out all the tests that may be necessary, such as analyzing a few milligrams of paper ash using spectrograph, or x-ray diffraction powder camera, or the micro analysis of a trace of ink using chromatography or electrophoresis, an appreciable number of highly specialized equipment will be needed. In short, determining authenticity requires forensic investigation and examination in a laboratory. In Kenya, that expertise and laboratories are confined to the National Police Service. Ordinarily, the police experts and their laboratories are not available for the private business of private persons. Writing on scientific examination of suspect documents in United Kingdom, Harrison notes that an average lawyer confronted tithe a case whose outcome may hand upon the authenticity of a

---

document, usually does to know who to consults or what reliance he can place on the results of a report on the authenticity of the document\textsuperscript{50}. It is not a wonder then that even in Kenya, the ELC and the parties before it usually adjudicate the dispute without the expertise and equipment for determining the most crucial fact i.e., the authenticity of the suspect documents.

\textsuperscript{50} Ibid at 1.
Part Three

Adjustments Needed To Match Adjudication to the Challenges

From the above observations, this paper suggests that adjudication in ELC should be redesigned so that as suggested below.

a. The ELC exercises jurisdiction to adjudicate disputes related to or connected with land and environment.

b. The objectives of the ELC align to the crucial objective of controlling the criminal conduct that generates the EL disputes. In this regard, the adjudication by ELC may adopt or co-opt some elements of the criminal justice system including exercising criminal jurisdiction over crime underlying the EL disputes.

c. Hold Land Registrars and other land officials involved in criminal activities personally liable to compensate their victims by damages or otherwise for their wrongdoings. The adjudication by ELC should endeavor to ensure that the liability and losses fall on the wrong doers especially compensating the innocent purchasers and that as far as possible, the innocent parties are held harmless.

d. Employ resources, tools, and procedures of the criminal justice system to determine technical questions of the crime. In dispute arising from criminal activity such as forgery, false documents, tampering with records and political dispossessions or other crimes.
e. Recalibrate the conditions for giving injunctions to protect the legal rights and interests of the respondent developers and investors.

The ELC is a creature of the law. Therefore, every decision of the Court must be based on some specific provision of the law donating the jurisdiction. Consequently, the challenge lies in finding sound legal footing for the suggestions within the current legal framework. Accordingly, in the final part, the paper explores how the proposed adjustments fit into the current legal framework.

**Fitting the Suggestions in the Legal Framework of ELC**

Fortunately, the legal framework of the ELC is wide enough to accommodate the adjustments that may be necessary.

**Exercise Jurisdiction over Criminal Offences Relating or Concerning Environment and Land**

The first proposal is to have the ELC adjudicate offences concerning or relating to land. This proposal is premised on the argument that on proper interpretation of the Constitution and the ELC Act, the ELC may be vested with jurisdiction to hear criminal matters relating to land especially the criminal offences established under the Land Act, Land Registration Act, ELC Act, and other and appeals there from. The paper is aware of the decision of the Supreme Court in *Republic v Karisa Chengo & 2 Others* 51 in which it was held that the a judge of the ELC does not have jurisdiction to hear criminal appeals. In the case Justice Angote of the ELC sat in a bench and heard an appeal from a decision in criminal proceedings of Magistrate Court convicting Karisa for robbery with violence contrary to section 296(2) of the Penal Code. However, facts of

51 [2017] eKLR
the hypothetical scenario at hand are substantially different from those of the decision in Karisa case. Unlike the Karisa case where the offence of robbery with violence has nothing to do with environment and land, criminal appeals from judgments in criminal cases heard by special Magistrates appointed by the Chief Justice under section 26 (4) (a) of the ELC Act specifically to hear environment and land disputes clearly revolve around the jurisdiction exclusively reserved for the ELC. This lays the ground for claiming that the criminal disputes in the ELC criminal proceedings under section 26(4) of the ELC Act are within Article 162(1) of the Constitution and therefore within the jurisdiction of the ELC. The Constitution and relevant statutes do not discriminate between civil and criminal disputes. It donates jurisdiction in terms of the matters ‘relating’ to or ‘concerning’ the environment, and the use and occupation and title to land.

Article 162 (1) (b) of the Constitution provides that the ELC shall have jurisdiction to hear and determine disputes relating to the environment and the use and occupation and title to land. Section 101 of the Land Registration Act describes the jurisdiction of ELC as to hear and determine disputes actions, and proceedings concerning land under this Act. Section 150 of the Land Act describes the jurisdiction of ELC as exclusive jurisdiction to hear and determine disputes actions and proceedings concerning land under the Act. In the absence of words exempting criminal disputes, the ordinary meaning of the words relating to and concerning include criminal matters. There is no provision in the Constitution or any statute denying the ELC jurisdiction over criminal matters. Absence of express provisions ousting the jurisdiction of the ELC in criminal proceedings relating to environment and land be reasonably construed to recognize that the ELC has jurisdiction over criminal matters relating to land and environment. It is well-established that no statute shall be construed to oust or restrict the jurisdiction of superior
courts in the absence of a clear and unambiguous language to that effect. Far from expressly excluding the ELC from jurisdiction to hear land and environment criminal disputes, Article 165(3) of the Constitution merely states that the High Court shall have unlimited and exclusive jurisdiction in criminal and civil matters. Nothing can be said to authorize Parliament to limit the jurisdiction of the ELC since Article 162(3) of the Constitution merely provides that Parliament shall determine the jurisdiction and functions of the courts established in clause 162(2). It may be argued that section 347(1) (a) of the Criminal Procedure Code restricts the jurisdiction to hear criminal appeals from the subordinate courts to the High Court. The section provides that a person convicted on a trial held by a subordinate court may appeal to the High Court. There are at least three objections to the argument. First, the reference to the High Court in section 347(1) (a) is a relic of history in the kindred to the now repealed section 130 (1) of the Environment Management and Coordination Act. Until it was rectified by amendment in Act No, 5 of 2015, the section provided that a person dissatisfied with the decision of the National Environment Tribunal may appeal to the High Court. In fact in paragraph 54 of the Judgment in Karisa case, the Supreme Court appreciated that section 347(1) of the Criminal Procedure Code was enacted prior to promulgation of the 2010 Constitution. The Supreme Court would probably have qualified their finding if the question of the jurisdiction over criminal matters relating to land and environment had arisen. The section and other kindred provisions in other statutes need to be reviewed to take cognizance of the jurisdictions of the courts of equal under the 2010 Constitution. Second, the words used are permissive. The word may leave the option to appeal to other courts with the appellate jurisdiction on the dispute. Third, under Article 2(1), the

---

Constitution is the supreme law of the land. Under Article 2(4), a provision in a statute that is inconsistent with the Constitution is invalid.

Back to the case for recognizing the jurisdiction of ELC in criminal disputes relating to or concerning land and environment we draw on section 26(4) (a) of the ELC Act providing that Magistrates appointed by the Chief Justice under sub-section 3 to preside over cases involving environment and land matters shall have power to handle disputes relating to offences defined in any Act of Parliament dealing with environment and land.

The sanctions that the Special Magistrate may order upon convicting in EL criminal cases strongly suggest that the appeals therefrom ought to be heard by the ELC. Section 157(6) of the Land Act provides that if convicted of an offence under section 157 of the Land Act, and the offence enabled the person to obtain or retain or regain any interest in land which the person would not have obtained except for the offence, the court may in addition to any punishment provided by section 157 impose on such person, or make and or order in relation to that interest in land to prevent the said person from benefitting from the offence. The said section empowers the magistrate court trying the criminal offence to direct the commission to revoke the allocation, terminate a lease, or direct the Registrar to cancel any entry in any register which has been obtained on account of the offence, or require that person to make the restitution to any person who has suffered loss by virtue or on account of the offence.

Regarding appeals, section 16A of the ELC Act provides that all appeals from subordinate courts and local tribunals in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the ELC Act shall be filed in the ELC. On trying criminal offences on matters relating to EL, section 26(4)(a) of the ELC Act providing that criminal offences relating to land
and environment may be tried by the special ELC magistrates appointed by the Chief Justice under the section.

These provisions strongly suggests that the Environment and Land Court system is vested with both original and appellate jurisdiction over both criminal and civil matters relating or concerning land and environment. As in the High Court system, the EL Magistrates adjudicate over EL civil matters subject to pecuniary jurisdiction and all criminal matters while the ELC superior court adjudicates over both civil and criminal appeals from ELC and all other EL matters above the jurisdiction of the Magistrate Court. The propriety of making findings of criminal liability in a matter that is not entirely criminal in nature is discussed below.

**Propriety of imposing criminal law sanctions for E & L proceedings**

It is within the law for the ELC to make a finding of criminal liability in ELC proceedings. This is despite the fact that the proceedings are not inform of the traditional criminal proceedings. In support of this argument, I draw a parallel to section 87(1) of the Elections Act. It provides that the Election Court shall at the conclusion of the hearing of a petition in addition to any other orders send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence was committed by any person in connection with the election and the names and descriptions of the persons if any who were proved at the hearing to have been guilty of an election offence of bribing and treating voters. This provision is controversial. It may be argued that the rights of the Respondent such as the right to remain silent may be compromised. However, in *Moses Masika Wetangula v Musikari Nazi Kombo and 2 others*, the Supreme Court of Kenya held that where allegations of electoral offences are made before an Election Court, the election court can quite properly proceed and

---

53 [2015] eKLR
subject the party found culpable to the sanctions specified by that particular statute. To the argument that the pleadings in an election petition do not afford the Respondent the notice of the charge with the particularity required in criminal proceedings, the Supreme Court held that if the pleadings contain all the particulars of the offence, the Respondent will be deemed to have had sufficient notice that there will be proof of an offence and as the respondent is fully aware of the complaint, the relevant sanctions including fines and imprisonment will apply fully if he is found culpable. In Wetangula’s case, the Election Court sitting in Kisumu had found Hon. Moses Wetangula liable of committing election offences. The finding was upheld by the Court of Appeal and the Supreme Court. The decision of the Supreme Court in Wetangula echoes Justice Kimondo in William Kinyanyi Onyango v IEBC AND 2 others54 where the court held that an election court has wide and unfettered powers under the Elections Act to deal with all allegations in the petition including election offences.

In Fredrick Otieno Outa and 4 Others the Supreme Court clarified that election offences are quasi criminal in nature and that the court ought not to enter a finding of guilt if there is any doubt as to whether such an offence was indeed committed and by whom55. However, care has to be taken because as stated by the Supreme Court in the Wetangula case cited above, the standard of proof for election offences even in election petitions is beyond reasonable doubt. The criminal jurisdiction of the ELC may be exercised fully to the extent of convicting and sentencing persons who are accused of criminal offences involving land and environment. As was held in the Wetangula case, In the case of the ELC, the jurisdiction, proceedings, and punishment would be confined to offences established under the statutes of the Court. I.e., statutes establishing or

54 [2013] eKLR
55 [2014] eKLR.
applied by the ELC. These are ELC Act, Land Act, Land Registration Act, Land Control Act, Physical Planning Act, Environment Management and Coordination Act, etc. As stated by the Supreme Court in *Wetangula* case all that is required is that the court be convinced that proof has been effected beyond doubt.

If the ELC does not for any reason wish to go all the way to convicting and sentencing, it may exercise its criminal jurisdiction over the offences in terms of section 87(1) of the Elections Act where the Court is required to make a report to the DPP so that the criminal offence may be prosecuted within a proper criminal trial. There is no corresponding provision in the Land Act, Land Registration Act, ELC Act, and any other Act expressly authorizing the ELC to make findings of criminal liability in environment and land matters. Nevertheless, the ELC often makes findings of criminal conduct in land matters. However the ELC falls short of declaring the crime. In *Francis Nyaga Njeru v China Road and Bridge Corporation and ARJ Capital*, Hon. Justice Ebosso in dismissing an application to be joined in the proceedings held that where the documentary evidence presented by an applicant appear to be fraudulent on its face, the court should not compromise the integrity of the court process by admitting a party whose intention is to scuttle the proceedings or use the process to advance a criminal enterprise. The Judge proceeded to issue an order directing the Director of Criminal Investigations to investigate all the affidavits and annexures to establish if the deponent one Amina Omar committed an offence. Further, that the Director of Criminal Investigations together with the Director of Public Prosecutions discharge their mandate if they find that the Amina committed and offence. The
ruling ends by directing that a copy of the ruling be served on the Director of Criminal Investigations. This is an instance of the ELC adopting the criminal justice process.

If as in Francis Njeru Case the DCI and DPP discharged their mandate as the Honorable Judge and other judges hope in this and other cases, there can be no doubt that the trajectory of sending fraudsters and other offenders in ELC matters would to prison would reduce the frauds, forgeries and other criminal conduct that generate a significant portion of environment and land disputes.

**Adopt the criminal justice system as alternative dispute resolution mechanism for crime based disputes**

The second proposal is that the ELC lope in the criminal justice system as an alternative dispute resolution mechanism for issues that revolve around EL offences or at least part of the dispute. Such issues may include detecting forged documents, authenticity of handwriting, ascertaining the circumstances of disappearance of records from the Land Registry, allegations of forcible entry and detainer in claims of adverse possession and other determinations of criminal conduct.

The criminal law applies even to the political dispossessions because forcible entry is a criminal offence under Section 90 of the Penal Code. The criminal justice system may just be able more able to contain the goons hired by politicians and perhaps the financing politician.

With respect to adopting the criminal justice system as Alternative Dispute Resolution mechanism in crime based disputes, it is noteworthy that the list of alternative dispute resolution mechanisms in Article 159(2) (c) and section 20 (1) of the ELC Act is not exhaustive. Section 20(1) of ELC Act provides for any other appropriate means of dispute resolution.

---

56 [2019] eKLR
As if to merge the civil and criminal jurisdictions, section 26(4)(a) of the ELC Act provides that Magistrates appointed by the Chief Justice under sub-section 3 to preside over cases involving environment and land matters shall have power to handle disputes relating to offences defined in any Act of Parliament dealing with environment and land.

The criminal justice system is to an extent recognized as a lawful method of determining a dispute arising from crime under section 47A of the Evidence Act. It provides that a final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall after expiry of the time limited for appeal or after the date of decision of the appeal whichever is latest be taken as conclusive evidence that the person so convicted was guilty of that offence as charged. Reading section 26(4) (a) of the ELC Act together with section 47A of the Evidence Act appears to suggest that it may be perfectly lawful for the ELC to direct the police to investigate alleged forgery, tampering with records, violence or any other criminal offence, file a report, and take any necessary action towards prosecuting offenders in the Magistrate Court appointed under sub-section 3. Ideally, the guilty parties in a substantial number of disputes turning on forgery, making false documents, and fraud would either decline to present their forged documents to police stations for ADR or attend only to be charged with the crime.

**Hold Land Registrars and Others Personally Liable In Damages**

The third proposal is that the Land Registrars and land officials who signed the documents constituting the suspected offence should be joined as defendants in their personal capacity and be held personally liable to pay the damage suffered by the innocent purchaser or owner. The parallel with election petitions shows that though the law is not settled on whether it is mandatory to join the Returning Officers, they are nevertheless invariably joined as Respondents in their
own names\textsuperscript{57}. In \textit{Abdalla Sharrif v Independent Elections and Boundaries Commission} and Hon. Abu Chiaba the High Court held that it was not mandatory to join the Returning Officer as a Respondent so long as IEBC was named as Respondent. The decision is reflected in \textit{Wilson Mbiti Munguti Kabuti & 5 Others V Patrick Makau King’ola}\textsuperscript{58}. In civil matters, Order 1 rule (3) of the Civil Procedure Act provides that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly or severally where if separate suits were brought, common questions of law and or fact would arise. Order 10(2) gives power to the Court to at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court to be just to order that the name of any person who ought to have been joined whether as plaintiff or as defendant or whose presence may be necessary in order to enable the court to effectually and completely to adjudicate and settle all questions involved in the suit to be added.

Ordering that the name of Registrar or other officials who signed be added should not be a problem for the Court because under Order 10(2) provides that the plaint shall be amended whenever a person is added as a defendant. In addition to charging the offending the Registrar with personal liability for the damages to the party injured by his wrongdoing, the court may recommend that the Ethics and Anti-Corruption Commission, Director of Public Prosecutions, and the Director of Criminal Investigations investigate and charge the officials with the criminal liability. With respect to personal responsibility for surveyors, section 21 of the Survey Act requires every surveyor to perform his duties according to the provisions of the Act and

\footnotesize\textsuperscript{57} [2014] eKLR. See \textit{Mudavadi v Kibisu and Another} [1970] EA, where the petition was struck out for failing to join the Returning Officer.

\footnotesize\textsuperscript{58} [2013] eKLR
regulation and expressly provides that the surveyor shall be responsible for the correctness and completeness of every survey carried out by him or under his supervision. Section 2 of the Act provides that surveyor means a Government Surveyor or a licensed surveyor. It would appear that the spirit of the law is that Government officials should is personally liable unless there is an express provision granting immunity. The Survey Act is quiet on whether the responsibility is criminal or civil of both. In my view, the word responsibility covers both. Joining and holing official personally responsible would again mirror election offences under the Elections Act. Section 87 of the Elections Act provides that the Election Court may in its judgment determine that a party to the election petition committed an election criminal offence. Articles 10(2) (c), Article 73 (2) (d), Article 232(1) (e) of the Constitution reiterate the principle that Public Officers are accountable to the public for their administrative actions and decisions. The spirit of personal responsibility is reflected in the Public Officers Code of Conduct and Ethics, 2016, published by the Public Service Commission under the Public Officers Ethics Act 2003. Rule 5 (a) of the Code provides that one of the specific objectives of the Code is to ensure accountability by a public officer of his or her decisions and actions. Rule 8 provides that a public officer shall be responsible for the reasonably foreseeable consequences of any acts or omissions arising from the performance of his or her duties. Rule 35(1) provides that provides that breaching the Code is a misconduct for which the officer may be subjected to disciplinary proceedings while rule 37 provides that if the authorized officer is of the opinion that civil or criminal proceedings should be preferred against the public officer, the authorized officer may refer the matter to the EACC, AG, DPP, or any other authority. This provision leaves no doubt that the accountability envisaged is both civil and criminal.
In *Leisure Lodge limited v Commissioner of Lands and 767 Others*, the High Court noted the conduct of the Commissioner of lands and the other State Officers named as Respondents displayed wanton abuse of office and impunity by purporting to revoke the title of the petitioner, subdividing the land, issuing title on it and while disobeying court orders at every stage. These sentiments of the High Court echoed those of the Court of Appeal in Leisure Limited case in which it found that the appellants were unwitting victims of surveyors and other lands officials. The Judge recommended that the Attorney General should take appropriate sanctions against them. The fact that in these cases and many others the courts declared officials in the Land Office liable of the wrong doings strongly indicates that they would hold the officials personally liable to compensate those injured by their actions if the officials were joined in the proceedings in their personal capacities.

**Rebalance the Terms of Injunctions to Protect Respondents**

The forth proposal is that the ELC protect the bona fide developers and investors from the extortionists, by requiring those who seek restraining orders to file an undertaking and deposit security to damages as a strict pre-condition for interim orders that restrain construction and other commercial projects. Mere undertaking to damages may not be entirely effective because the extortionists conveniently employ a hapless peasant as the plaintiff. This is to frustrate the defendant investor who may pursue the plaintiff for costs when the suit is ultimately dismissed. The trick as well frustrates the efforts of successful defendant investor enforcing the undertaking against the peasant.

---

59 [2019] eKLR
60 Ibid.
61 Ibid at para 97
Accordingly, time may have come for the courts to enhance the protection for the defendant by insisting on security for damages as pre-condition for granting injunctions. This suggestion is not outrageous because the Civil Procedure Rules of United Kingdom Practice Direction 25 A provides that unless the court orders otherwise, any order for an injunction must contain an undertaking by the Applicant to the court to pay any damages which the respondents of any other party served with or notified of the order might sustain. The undertaking given by the Applicant is incorporated into the form of the order. The Applicant undertakes to pay the damages which the Respondent sustains in event it turns out that the injunction should not have been granted. Under Practice Direction 25A paragraph 5.2, the court may order that the undertaking be extended to cover other parties including persons who are not parties to the particular proceedings. The applicant must in addition provide evidence of his ability to meet any order which may be made against him or provide a guarantee by a 3rd party. The court may require the undertaking to be secured by payment into court of the an appropriate sum to enforce the undertaking or in order to reinforce the undertaking, the claimant may be required to deposit a lump sum with the solicitors of both parties jointly. Failure to provide the undertaking in the order may not necessarily be corrected retrospectively. In that spirit, the Court of Appeal of Kenya in Rockland Kenya Ltd v Eliot White Miller held that the need to protect the applicant with an injunction must be weighed against the corresponding need of the defendant to be protected against the injury resulting from his having been prevented from exercising his own legal right.

---

64 Ibid
bfor which he could not be adequately compensated under the plaintiff undertaking in damages
where the trial ends in his favor65.

However, even before we get to the undertaking and security, the mischief may be controlled
by simply being extra vigilant against the plaintiff who seeks injunctions to restrain ongoing
projects without convincing evidence to explain why they failed to apply at the apparent earliest
possible opportunity. For instance, as soon as the project was advertised for sale off plan, when
condoning off the site etc. The common question of, where were you all the time, may do the
trick. The trick may just be stricter application of the old maxims of equity especially that delay
defeats equity, coming with clean hands, and the need to do equity by undertaking or security.

Utilize the Resources of Criminal Justice System

The fifth is that the ELC utilizes the resources of the criminal justice system. While
acknowledging that the ELC is primarily an adversarial forum guided by the Civil Procedure
Act, this paper notes that in disputes that arise from crime relating to false documents, there is
nothing to prevent the ELC from directing officers of the forensic laboratories National Police
Service to examine documents that are alleged to be forgeries and to file reports with the Court.
Indeed, Order 40 rule 10(1) (c) of the Civil Procedure Act, provides that the Court may order
samples to be taken, or any observations to be made or experiment to be tried, which may be
necessary or expedient for the purposes of obtaining full information or evidence. The approach
may even fit well with the overriding objective under 1A of the Civil Procedure Act.

---

Employ Law on Contempt of Court Widely

The sixth proposal is that the ELC should make wider use of its powers to punish persons for contempt of court. Fabricating claims by making and filing false documents, swearing lies on oath in the affidavit or otherwise and other acts and omissions that are criminal under any statute is contempt of court. The ELC should protect itself from such fraudsters by citing them for contempt of court. In the case of *Chandra Shashi v Amil Kumar Verma* and the case of *Zahira Habibullah Sheikh v State of Gujarat*, the Supreme Court of India held that filing documents in court with intent to deceive the court is contempt since it amounts to interfering with administration of justice.

Conclusion

The anatomy of the disputes has changed from purely civil disagreements to crime. The crimes include forgery, falsification of documents, tampering with registry records, and violent dispossessions involving politicians. There is also the quasi crime of extorting ransoms from developers using ex-parte injunctions obtained in fabricated claims. The metamorphosis of the disputes from civil to crime based presents several challenges to adjudication by the ELC. These include the inability of the ELC to deal with the criminal aspects because the ELC is excluded from exercising jurisdiction over the criminal offences, lack of appropriate tools for adjudicating the crime, absence of the real culprits, innocent adversaries in the adjudication. To be effective in adjudicating the crime based disputes, the ELC needs to adjust accordingly. Fortunately, it appears that the adjustments can be accommodated in the current legal framework. These include

---

66 *James Mulinge v Freight Wings Ltd & 3 others* [2016] eKLR
the ELC exercising jurisdiction over criminal offences involving or concerning environment and land, joining and holding the individual land officers personally liable for the damage suffered by any party, adjusting the terms of restraining injunctions to protect the developers with undertaking and security for damages and finally, adopting some of the tools and processes of the criminal justice system.