



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bebadis Company Limited v Nyotta & 2 others (Environment and Land  
Appeal E050 of 2022) [2023] KEELC 16115 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16115 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E050 OF 2022**

**JA MOGENI, J  
MARCH 16, 2023**

**BETWEEN**

**BEBADIS COMPANY LIMITED ..... APPELLANT**

**AND**

**JASPAL NYOTTA ..... 1<sup>ST</sup> RESPONDENT**

**SEDCO CONSULTANTS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**DANIEL KIMANI KARIUKI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me for determination is the notice of preliminary objection dated August 16, 2022 by the 3<sup>rd</sup> Respondent which seeks to strike out the Appellant's Appeal on grounds *inter alia* that this Court lacks jurisdiction, for the following reasons:
  1. That the appeal No ELCA E050 of 2022 was filed three days out of time without leave of the court in violation that all appeals from the subordinate court shall be filed within Thirty (30) days as stipulated under section 79G of the *Civil Procedure Act*.
  2. That the Appellant herein did not seek or obtain leave to appeal from the Subordinate court. The Order and the ruling being appealed against does not fall under the thematic orders which appeals lie as of right as set forth under order 43 rule 1(1) of the civil procedure rules and section 75 of the civil procedure Act. The Ruling and Order the subject of this appeal arose from the provisions of Order 51 rule 1 of the *Civil Procedure Rules*, Sections 3 and 3A of the *Civil Procedure Act* and Article 50(1) and 159(2) of the *constitution of Kenya, 2010*.
  3. That the 3<sup>rd</sup> Respondent herein is the Sole Person appointed by the High Court through an order issued on November 21, 2018 in Milimani HCC E115 of 2018 to run the business and affairs of the Appellant herein, which order has not been appealed or reviewed. The 3<sup>rd</sup>



Respondent has not appointed and/or authorized the Firm of Kamau Chege and Kagunyi to act for the Appellant in these proceedings.

2. The Court had given directions regarding disposal of both the appeal and the preliminary objection together on October 27, 2022 but the Appellant did not file any response to the preliminary objection. Therefore, the preliminary objection is not opposed.
3. By the time of writing this Ruling, only the 3<sup>rd</sup> Respondent had filed written submissions dated January 19, 2023.
4. I have considered the Appeal, the Preliminary Objection raised and the 3<sup>rd</sup> Respondent's submissions. The main issues arising for determination are whether the preliminary objection raises pure points of law and whether this court has jurisdiction to hear and determine this Appeal.

### **Whether the preliminary objection raises pure points of law**

5. The 3<sup>rd</sup> Respondent herein has raised a preliminary objection on the ground that this court has no jurisdiction to hear the appeal herein as the appellant did not seek leave in the lower court to file an appeal among other grounds.
6. The starting point is to determine what a preliminary objection is. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection 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...”

7. This statement of the law has been echoed time and again by the courts: see for example, *Oraro -v- Mbaja* [2007] KLR 141. In *Hassan Ali Jobo & another -v- Suleiman Said Shabal & 2 Others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that;-

“.... 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”. [emphasis added].

8. The 3<sup>rd</sup> Respondent has based his Preliminary Objection on the ground that this Court lacks jurisdiction to hear and determine this appeal. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Appellant's case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court *in the Matter of Interim Independent Electoral Commission* [2011] eKLR held as follows:

Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue



right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

9. The issue of jurisdiction is key since without jurisdiction a court has no powers to proceed to entertain the matter and it has to down its tools. I am of the considered view that since this Appeal is yet to be heard, the 3<sup>rd</sup> Respondent is within the law to raise Preliminary Objection challenging the jurisdiction of this court. It is my finding that the Preliminary Objection raised by the 3<sup>rd</sup> Respondent is one on a pure point of law that that this court needs to determine.

### **Whether this court has jurisdiction to hear and determine this Appeal**

10. Having determined that the Preliminary Objection by the 3<sup>rd</sup> Respondent is based on pure points of law, it will be important to determine whether this court lacks jurisdiction to hear and determine this appeal.
11. I have looked at the record of appeal filed in the matter. The issue at hand is that the Appellant wants to appeal the decision of the lower court. The Appellant was dissatisfied with the ruling delivered on May 24, 2022 by Hon HM Nyaga in the Chief Magistrates Court in Nairobi in Civil Case No 10717 of 2018; *Jaspal Nyotta and another v Daniel Kimani Kariuki & another*.
12. Regarding the first ground, this Court notes that the Ruling was delivered on May 24, 2022 and the Memorandum of Appeal was subsequently filed on June 26, 2022. This was outside the stipulated period of thirty (30) days under Section 79G of the Civil Procedure Act. It is true the appellant was over by three (3) days.
13. Regarding the second ground, from a casual glance of the application dated March 16, 2022, the same was filed pursuant to Section 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Article 50 (1) and 159 (2) of the Constitution of Kenya, 2010. Thereafter, the Orders issued on June 2, 2022 were also pursuant to Section 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Article 50 (1) and 159 (2) of the Constitution of Kenya, 2010.
14. This Court’s jurisdiction emanates from Article 162 of the Constitution as read with section 13 of the Environment and Land Court. I wish to refer to section 13 of the Environment and Land Court Act which confers jurisdiction to this Court and 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.’
15. The applicable law is found at Section 75 of the Civil Procedure Act and Order 43 Rule 1(1) of the Civil Procedure Rules. From the reading of provisions of Order 43(1) of the Civil Procedure Rules, it is clear that it sets out the orders from which appeals would lie as a matter of right; and at Order 43(2) which is couched in mandatory terms and provides that any appeal from orders not listed in Order 43(1)(1) ‘shall’ only lie with the leave of the court (emphasis mine); Section 75 of the Civil Procedure Act then states that such leave to appeal shall be made to the court of first instance and can be made orally at the



- time the order is made or within fourteen days from the date of such order; and Order 43(4) expounds on the order which includes an order granting the relief applied for or an order refusing such relief.
16. This court has the jurisdiction to hear and determine appeals from tribunals, subordinate courts or bodies as prescribed by Article 165 of the Constitution and other Acts of Parliament. Nonetheless a party who desires to file an appeal to this court has a duty to demonstrate under what law that right to be heard on an appeal is conferred or if not, show that leave has been granted by the court that made the order which is impugned to lodge the appeal before the court.
  17. I have carefully examined the ruling made by the trial court. Hon Nyaga in his ruling upheld the application brought under Section 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Article 50 (1) and 159 (2) of the Constitution of Kenya, 2010 wherein the court found that the firm of Kamau Chege and Kagunyi advocates ceased to be in conduct of the matter on behalf of the appellant on February 15, 2021 and are therefore not properly on record and that the pleadings filed by the said firm were found to be invalid and therefore expunged from the record.
  18. This appeal does not fall within the ambit of the orders set out in Order 43 Rule 1 (1) and it is thus not of right according to Order 43 (2) of Civil Procedure Rules.
  19. There is no evidence adduced before this Court that the appellant sought leave to appeal from the court that issued the impugned orders. Upon perusal of the court record, it does not reflect any leave to appeal being sought or obtained by the appellant before he filed the instant appeal. This Court therefore does not have jurisdiction to hear the appeal herein.
  20. The consequence of failure to seek leave of the court to file an appeal is explained in the Court of Appeal decision of Nyutu Agrovat vs Airtel Networks Ltd [2015] eKLR; wherein a five (5) judge bench held that where there was no automatic right to appeal as stipulated under Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules then the appellate court had no jurisdiction to hear or determine an appeal unless such leave was first sought and obtained.
  21. From the above decision, the omission in this instance touches on jurisdiction of the court; and this court is guided by the aforesaid decision which also held that “.....the right to appeal is conferred by statute and cannot be inferred”.
  22. Jurisdiction goes to the root of the matter. See the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR. Without jurisdiction this court or any other court can do nothing more than down its tools; as was held in Owners of Motor Vessel 'Lilian S' vs Caltex Oil (K) Ltd (1989) KLR.
  23. In light of the above, this Court finds and holds that the instant Notice of Preliminary Objection dated August 16, 2022 raised a pure point of law. I am satisfied that the appeal is not competently before this court.
  24. From the foregoing reasons, the Notice of Preliminary Objection dated August 16, 2022 is upheld as the appeal is found not to be competently before this Court. The appeal is hereby struck out with costs to the 3<sup>rd</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIVASHA ON THIS 16TH DAY OF FEBRUARY 2023.**

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**MOGENI J**

**JUDGE**



**In the virtual presence of:-**

Mr Chumo holding brief for Mr. Otwal for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Wanjir holding brief for Mr Okelo for Applicant

Mr.Daniel Kimani for the 3<sup>rd</sup> Respondent in person

**Ms. C. Sagina : Court Assistant**

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**MOGENI J**

**JUDGE**

