



**Mursal (Suing in her capacity as the administrator of the Estate of
Haji Yusuf Ali Mursa) v Alihussein (Environment and Land Appeal
1 of 2022) [2023] KEELC 18944 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT AND LAND APPEAL 1 OF 2022**

JM MUTUNGI, J

JUNE 29, 2023

BETWEEN

ANAB YUMS MURSAL APPELLANT

**SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF
HAJI YUSUF ALI MURSA**

AND

HAJI IBRAHIM ALIHUSSEIN RESPONDENT

*(Being an Appeal against the Judgment dated 29th of October 2020 of Hon. A.
K. Mkoross Senior Principal Magistrate in Wajir in CMCC No. 3 of 2019)*

JUDGMENT

1. The instant Appeal is against the Judgment delivered by Hon. A. K. Mkoross Principal Magistrate in Wajir CMCC No. 3 of 2019 on October 29, 2020. By the Judgment the Learned Trial Magistrate entered Judgment in favour of the Plaintiff, the Respondent in the present Appeal as against the County Government of Wajir, the 3rd Defendant before the Subordinate Court in the following terms:-
 - a. General damages in the sum of Kshs 1,000,000/-.
 - b. A permanent injunction be and is hereby granted restraining the Respondents and the Interested Party from interfering with the Plaintiff's quiet possession of plot No. T249 parcel also known as B775 situated in Wajir Town.
 - c. Costs of the suit.
 - d. Interest at Court rates on (a) and (c), above from the date of Judgment.



2. Aggrieved by the decision of the trial Court, the Appellant has appealed against the decision. The Appeal was initially filed before the High Court at Garissa as Civil Appeal No. 12 of 2019. On 26th May 2022 the Appeal was ordered transferred to this Court for hearing and determination. The Appeal following the transfer was renumbered as Garissa ELC Appeal No. 1 of 2022. It is necessary to note that the initial Appeal filed on 15/11/2019 as Garissa HC Civil Appeal No. 12 of 2019 related to a Ruling made by the Trial Court on 30th July, 2019 in regard to a Preliminary Objection by the Appellant that the trial Court declined to uphold thereby provoking the Appeal.
3. The initial Memorandum of Appeal filed on November 15, 2019 clearly indicated the Appeal was against the Ruling delivered on July 30, 2019 by the Senior Resident Magistrate Hon. A. K. Mokoross and listed Four grounds of Appeal as follows:-
 1. The Learned Trial Magistrate erred in law and fact and misdirected himself by holding that the matter was not Res Judicata yet all the evidence on record and submissions pointed clearly to that fact.
 2. The Learned Magistrate erred in law and fact by giving two separate Rulings on the Preliminary Objection. One on the 2nd of July upholding the Appellant's Preliminary Objection and the other on the 31st of July dismissing the Preliminary Objection.
 3. The Learned Magistrate erred in Law and reviewing the Ruling on 31st day of July 2019 without being prompted by either party through an application either filed or oral on record prompting the same.
 4. The Learned Magistrate erred in Law and infact in adjudicating an issue that he was functus officio.
4. The record shows that the Appellant on November 15, 2021 filed a Notice of Motion dated November 10, 2021 in the High Court. The application prayed for the following orders: -
 1. That this Honourable Court be pleased to reinstate the Appeal dated November 11, 2019 being an Appeal against the Court Ruling dated July 30, 2019.
 2. That this Honourable Court be Pleased to substitute the Appellant who died on December 8, 2020 with Anab Yunis Ali Mursal the Administrator of the Estate of Haji Yusuf AliMursal(deceased).
 3. That the Court file for Civil Appeal No. 12 of 2019 be transferred from this Honourable Court to the Environment and Land Court (ELC) Division for its hearing and determination and that the draft Amended Memorandum of Appeal annexed hereto be treated as Appellant's Memorandum of Appeal.
 4. That leave be granted to file an Appeal out of time against the Judgment dated October 29, 2020.
5. The record of proceedings before the High Court indicates this application was fixed for hearing on 15/12//2021 and came up before Lady Justice A. A. Aroni (as she then was) when the Appellant urged the application. Lady Justice Aroni in her Ruling on May 26, 2022 apart from holding that she lacked the jurisdiction to deal with the matter, as it squarely fell within the jurisdiction of the Environment and Land Court, and ordering the transfer of the matter to this Court for further action did not make any determination respecting the other prayers in the application.



6. To the extent that the Notice of Motion dated November 10, 2021 was not heard and determined on merit, it means that there was no formal substitution of the Appellant and no leave was granted to file an Appeal against the Judgment dated October 29, 2020. Essentially therefore there cannot be a competent Appeal against the Judgment dated 29th October, 2020. The Court notes that under Prayer (3) of the Notice of Motion dated 10th November, 2021 the Appellant sought to have the draft amended memorandum of Appeal annexed to the application deemed to be the Appellants Memorandum of Appeal. If the prayer was allowed, the amended Memorandum of Appeal would substitute the earlier Memorandum of Appeal filed on 15th November, 2019. The Record of Appeal filed by the Appellant together with submissions did not contain a copy of the Memorandum of Appeal and in my view did not comply with the Provisions of the ELC Practice Direction Number 42, 42(6) and Order 42 Rule 13 of the [Civil Procedure Rules](#) relating to what a record of Appeal must contain.
7. Having regard to the foregoing it is my determination that there is no competent Appeal before me to invite my determination. I strike out the Record of Appeal and award the costs of the Appeal to the Respondent.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED THIS 29TH DAY OF JUNE 2023.

J. M. MUTUNGI

E.L.C - JUDGE

