



**Jiwa & another v Jiwa (As Trustee of Kulsumbhai Trust) & another (Civil Appeal 49 of 2018) [2022] KEHC 16649 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16649 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 49 OF 2018  
OA SEWE, J  
DECEMBER 20, 2022**

**BETWEEN**

**YUSUF JIWA ..... 1<sup>ST</sup> APPELLANT**

**NAUSHAD JIWA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AUN JIWA (AS TRUSTEE OF KULSUMBHAI TRUST) ..... 1<sup>ST</sup> RESPONDENT**

**ROSEMIN NAZERALI JIWA (AS TRUSTEE OF KULSUMBHAI TRUST) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is an appeal that was filed on March 21, 2018 by the two appellants, Yusuf Jiwa and Naushad Jiwa, in respect of the judgment and decree passed by Hon Nang'ea, CM, in Mombasa CMCC No 618 of 2010 as consolidated with CMCC No 619 of 2010. The respondents had sought for vacant possession of rented premises as well as mesne profits. The lower court found in favour of the respondents and issued orders as hereunder:
  - (a) The defendants are directed to give vacant possession of the suit property being the residential premises they occupy within 30 days from the date hereof.
  - (b) Each of the defendants will further pay to the plaintiffs mesne profits at the rate of Kshs 10,000/= per month from December 2009 until the date when vacant possession is given.
  - (c) As the parties are close relatives and given the nature of the ownership of the suit property, no order is made as to costs.
2. Accordingly, upon perusal of the record of the lower court with a view of writing my judgment in the appeal, I took the tentative view that the matter ought to have been filed before the Environment and Land Court (ELC), that court being the court with the requisite jurisdiction to entertain appeals in



respect of disputes over rent. Indeed, the Court of Appeal in [\*Kenya Ports Authority v Modern Holding \[EA\] Limited \[2017\] eKLR\*](#), held thus:

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard.”

3. Accordingly, counsel for the parties were given an opportunity to address the Court on the issue of jurisdiction; and while counsel for the appellant, Ms Nduku, had no objection to this matter being transferred to the ELC, Ms Otuya for the respondent took the view that this appeal is properly before this Court; and that this Court does have jurisdiction to entertain appeals in respect of eviction orders. She relied on [\*Nandlal Jivraj Shah & 2 others \(all trading as Jivaco Agencies v Kingfisher Properties Limited \[2015\] eKLR\*](#).

4. Needless to underscore the primacy of jurisdiction. Hon Nyarangi, JA, in [\*Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd \[1989\] eKLR\*](#) made the point thus:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

5. And, in [\*Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others \[2012\] eKLR\*](#), the Supreme Court held that:

“A court’s jurisdiction flows from either the [\*Constitution\*](#) or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the [\*Constitution\*](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the [\*Constitution\*](#) exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the [\*Constitution\*](#). Where the [\*Constitution\*](#) confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

6 Thus, the jurisdiction of the High Court is provided for under Article 165(3)(a) of the [\*Constitution\*](#) which stipulates, in part, that:

Subject to clause (5), the High Court shall have-

(a) Unlimited original jurisdiction in criminal and civil matters;



7. Article 165(5) of the Constitution on the other hand, provides that:
- (5) The High Court shall not have jurisdiction in respect of matters: -
- (a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - (b) Falling within the jurisdiction of the courts contemplated in Article 162(2).
8. Accordingly, Section 13 of the Environment and Land Court Act, 2011, an Act of Parliament enacted pursuant to Article 162(2) of the Constitution is explicit that:
- (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
    - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
    - (e) any other dispute relating to environment and land.
9. It is plain therefore that disputes in connection with tenancies and rents are matters that fall within the jurisdiction of the ELC. Indeed, Section 13(4) of the Environment and Land Act is explicit that:
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
10. I have given due consideration to the authority cited by Ms Otuya and note that it is distinguishable from the facts of this case in more ways than one. Firstly, the appeal arose from the decision of the High Court in its original jurisdiction in that the proceedings for eviction were filed in the High Court after a notice to terminate a controlled tenancy had expired. Secondly, the notice to terminate the tenancy was issued on March 2, 2010 while the suit for vacant possession was filed before the High Court on April 4, 2011, before the Environment and Land Court Act came into operation.
11. Hence, it is my finding that, since this Court lacks the requisite jurisdiction to entertain the appeal, I must down my tools, as it would be superfluous for me to render a decision in this appeal without the requisite jurisdiction. Thus, in the spirit of Article 159(2)(d) of the Constitution, and in the interest of justice, it is hereby ordered that, instead of striking out the appeal for want of jurisdiction, the same be and is hereby transferred to the Environment and Land Court, a court of equal status as the High Court, for hearing and determination.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF DECEMBER 2022.**



**OLGA SEWE**  
**JUDGE**

