



**Mohamed Hadi Abeid t/a Hadi Mohamed Mini Grocer Shop v Salim & 5 others  
(Civil Appeal 248 of 2021) [2022] KEHC 16570 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16570 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 248 OF 2021  
OA SEWE, J  
DECEMBER 16, 2022**

**BETWEEN**

**MOHAMED HADI ABEID T/A HADI MOHAMED MINI GROCER  
SHOP ..... PLAINTIFF**

**AND**

**SAIDA SALIM ..... 1<sup>ST</sup> DEFENDANT  
FARIS ABDALLA ..... 2<sup>ND</sup> DEFENDANT  
RUWAIDA ABDALLA ..... 3<sup>RD</sup> DEFENDANT  
TALA BIBU ABDALLA ..... 4<sup>TH</sup> DEFENDANT  
THABIT ABDALLA ..... 5<sup>TH</sup> DEFENDANT  
FERUZ ABDALLA ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated June 2, 2022 was filed by the appellant under sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 40 Rule (10) of the *Civil Procedure Rules*, 2010. The appellant thereby seeks the following orders:
  - (a) Spent
  - (b) Spent
  - (c) That the court do issue temporary orders staying the execution of the judgment delivered by Hon. Kiage (SRM) on December 3, 2021 pending the hearing and determination of the appeal;
  - (d) The costs of the application be provided for.



2. The application was premised on the grounds that the appellant, who averred that he is a son to the 1<sup>st</sup> respondent and therefore a sibling to the 2<sup>nd</sup> to 6<sup>th</sup> respondents, is aggrieved by the entire ruling and orders delivered in Mombasa CMCC No. 871 of 2018: Mohamed Hadi Abeid v Saida Salim & 6 Others. He contended that prior to the expiry of the 30 days' stay granted by the lower court, the respondents had already moved into the suit premises and threatened to evict him and demolish the extension he had erected, on the false assertion that it was an illegal structure. He was therefore apprehensive that, unless stay of execution was granted, the respondents would move to execute the lower court's decree and thereby render this appeal nugatory.
3. In response to the application, the respondents filed a Notice of Preliminary Objection dated June 15, 2022, contending that:
  - (a) This Court has no jurisdiction to hear, entertain and/or determine the Notice of Motion dated 2<sup>nd</sup> June 2022; and consequently the appeal herein, as it is a property dispute between landlords and a tenant, which dispute falls within the purview of section 13 of the Environment and Land Court Act;
  - (b) The underlying complaint is alleged disturbance of the appellant's occupation of premises constructed on the parcel of land known as Mombasa/Block XLV/120 by the respondents and therefore the court with original jurisdiction to hear the same is the Environment and Land Court and not this court;
  - (c) The appellant's application dated June 2, 2022 is fatally and incurably defective as such cannot stand or be ventilated before this court;
  - (d) The application *is ipso facto* an abuse of the court process and ought to be struck out and or dismissed with costs to the 1<sup>st</sup> to 6<sup>th</sup> respondents.
4. In addition to their Notice of Preliminary Objection, the respondents filed a replying affidavit, sworn on their behalf by the 4<sup>th</sup> respondent, Tala Bibu Abdalla. The 4<sup>th</sup> respondent, in essence reiterated the grounds set out in the notice of preliminary objection and asserted that the court with the requisite jurisdiction to entertain the application as well as the appeal is the Environment and Land Court. At paragraphs 7 and 8 of the replying affidavit, the 4<sup>th</sup> respondent explained that sometime in 1999, the 1<sup>st</sup> respondent entered into an oral agreement with the appellant whereby he was allowed to operate a temporary structure on the subject property; and that the appellant would later on without their consent as owners of the property, construct a permanent structure on the space he was occupying.
5. The 4<sup>th</sup> respondent also pointed out that, in addition to the fact that their permission was not sought for the construction, the structure encroached onto the road reserve in front of the subject property, prompting the respondents to make a complaint to the County Government of Mombasa. It was thereupon that the appellant filed Mombasa CMCC No. 871 of 2018 in which the appellant sought for a permanent injunction, among other prayers, to stop them from interfering with his occupation of the subject property. The 4<sup>th</sup> respondent pointed out that the appellant lost the case and was ordered to immediately vacate the suit property and hand over vacant possession to the respondents.
6. At paragraphs 11 to 13, the 4<sup>th</sup> respondent averred that, instead of complying with the orders of the lower court, the appellant not only stopped paying the rent of Kshs. 5,000/= agreed on by the parties, but also continued to make additional improvements without their consent, thereby blocking the main entrance into the property. It is therefore the assertion of the respondents that the appellant has not satisfied the threshold for grant of stay of execution; and that his application is nothing but a waste



of judicial time. They consequently prayed for the striking out or dismissal of the application dated June 2, 2022.

7. Upon directions being given on June 13, 2022 that the application be canvassed by way of written submissions, Ms. Nafula for the respondents filed her written submissions on September 20, 2022. She proposed two issues for determination, namely, whether the Court has jurisdiction to hear the application and by extension, the appeal; and whether the application for stay of execution is merited.
8. By September 21, 2022 when the matter came up for mention for further directions, the appellant was yet to file his written submissions. Nevertheless, Mr. Odhiambo indicated that the appellant was not averse to the transfer of this appeal to the Environment and Land Court; a stance that was objected to by counsel for the respondents as it amounts to a departure from the tenor and effect of the appellant's application dated June 2, 2022.
9. I have given due consideration to the application, the response thereto as well as the written submissions filed herein by the respondent. That jurisdiction is primordial and is an issue that can be raised at any stage of the proceedings needs no emphasis. The Court of Appeal made this clear in *Kenya Ports Authority v Modern Holding [EA] Limited* [2017] eKLR, 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.”

10. And, when thus raised, as has been done in this matter, the court is duty bound to consider it and a determination thereon before turning its attention to the merits of the matter before it. The rationale was well-explicated by Hon. Nyarangi, JA, in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR 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.”

11. 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."

12. 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;

13. 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).

14. 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.

15. It is plain therefore that disputes in connection with tenancies and right to occupy and use land are matters that fall within the jurisdiction of the Environment and Land Court. 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.

16. Hence, being convinced, as I am that this Court lacks the requisite jurisdiction to entertain the appeal, including the instant application, I must down my tools, as it would be superfluous for this Court to consider the merits of the application. However, 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; and that costs shall abide the outcome of the appeal.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16<sup>TH</sup> DAY OF  
DECEMBER 2022.

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OLGA SEWE

JUDGE

