



**Savage v Les Belles Sauyages Limited (In Liquidation) & another (Environment and Land Case Civil Suit 270 of 2017) [2023] KEELC 19188 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19188 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 270 OF 2017**

**JO MBOYA, J**

**JULY 27, 2023**

**BETWEEN**

**PAUL JAMES SAVAGE ..... PLAINTIFF**

**AND**

**LES BELLES SAUYAGES LIMITED (IN LIQUIDATION) ..... 1<sup>ST</sup> DEFENDANT**

**MONA HUSSEIN DUALE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction and Background**

1. The 2<sup>nd</sup> Defendant/Applicant has approached the Honourable court and filed two Applications; namely, the Application dated the 5<sup>th</sup> June 2023; and the Application dated the 22<sup>nd</sup> June 2023, respectively.
2. In respect of the Application dated the 5<sup>th</sup> June 2023, the 2<sup>nd</sup> Defendant/Applicant has sought for the following reliefs;
  - a. Spent
  - b. Spent
  - c. Pending the hearing and determination of the Application, a Temporary order Injunction is hereby issued staying the Judgment, and an order restraining any registration or dealing in the register of that Parcel of Land known ss LR No Kwale/Diani Beach Block 78313.
  - d. A Temporary order do and is hereby issued that the proceeds from the cottage in Diani built on LR No Kwale/Diani Beach Block/78313; be placed in an interest earning account are deposited in court and an independent person be appointed to operate the establishment pending the hearing and determination of this Application and suit in the Interest of Justice.



- e. A Temporary order do and is hereby issued directed at the Plaintiff to render accounts of all the monies received from that cottage known as Almond Cottage, Kijiji Cottages, Diani erected on LR No Kwale/Diani Beach Block/783/3 in the name of the 1st Defendant from the date of purchase to date pending the determination of this application and suit.
  - f. The Judgment of this Honourable Court be set aside, the 2nd Defendant be granted lease to file her defence and counter claim out of time and this suit be heard afresh and The Draft annexed 2<sup>nd</sup> Defendant's Draft Defence and Counter-claim be deemed duly filed upon payment of the requisite court fees.
  - g. Such and/or further orders do issue in the Interests of Justice.
  - h. The cost of this Application be provided for.
3. The instant Application is premised and anchored on various, albeit numerous grounds, which have been alluded to and enumerated in the body of the subject Application. Furthermore, the Application is supported by the affidavit of the 2<sup>nd</sup> Defendant/Applicant sworn on the 5<sup>th</sup> June 2023; and in respect of which same has annexed a total of four (4) documents.
  4. On the other hand, upon being served with the subject Application, the Plaintiff/Respondent filed an elaborate Replying affidavit sworn on the 14<sup>th</sup> June 2023; and wherein the Plaintiff/Respondent has attached and/or annexed assorted documents, inter-alia, a copy of the Appeal which was filed by the 2<sup>nd</sup> Defendant/Applicant before the Honorable Court of Appeal, namely, Court of Appeal Civil Appeal No. E362 of 2020.
  5. Other than the foregoing, the 2<sup>nd</sup> Defendant/Applicant has also filed another Application, namely, the Application dated the 22<sup>nd</sup> June 2023; and in respect of which same has sought for the following reliefs;
    - a. For reasons shown, this Application be certified as urgent, its service dispensed with and the same be heard *ex parte* in the first instance for Purposes of prayer (b).
    - b. Pending hearing and determination of this Application a Temporary order do issue directing that an independent person to manage the suit property and/or proceeds be kept in an interest earning account'
    - c. This suit be and is hereby transferred to High Court of Kenya Nairobi Commercial Division, Milimani for hearing and disposal and be consolidated and heard with Milimani H.C.C Winding up Cause No 23 of 2009
    - d. Such other and/or further order do issue in the Interest of Justice'
    - e. The cost of this Application be provided for.
  6. For good measure, the instant Application is premised and anchored on various grounds which have been enumerated in the body thereof. Further and in addition, the subject Application is supported by an affidavit sworn by the 2<sup>nd</sup> Defendant/Applicant on the 22<sup>nd</sup> June 2023; and in respect of which same has attached and or annexed one document, to wit, a copy of CR-12 relating to the Directorship of the 1<sup>st</sup> Defendant herein.
  7. Instructively, the matter came up for hearing on the 26<sup>th</sup> June 2023, whereupon Learned counsel for the 2<sup>nd</sup> Defendant/Applicant intimated to the Honourable court that same had filed three separate and distinct Applications. In this regard, Learned counsel for the Applicant alluded to the Application dated the 5<sup>th</sup> June 2023; 15<sup>th</sup> June 2023 and the 22<sup>nd</sup> June 2023, respectively.



8. Additionally, Learned counsel for the 2<sup>nd</sup> Defendant/Applicant thereafter intimated to the Honourable court that same was keen and desirous to withdraw the Application dated the 15<sup>th</sup> June 2023. Consequently and in this regard, the Application dated the 15<sup>th</sup> June 2023, was duly marked as withdrawn.
9. Other than the foregoing, Learned counsel for the 2<sup>nd</sup> Defendant/Applicant signified that same was keen and desirous to have the Applications dated the 5<sup>th</sup> June 2023 and the 22<sup>nd</sup> June 2023, heard contemporaneously and or at the same time.
10. Suffice it to point out that the intimation by Learned counsel for the 2<sup>nd</sup> Defendant/Applicant was duly conceded/ accepted by Learned counsel for the Plaintiff/Respondent, culminating into the Honourable court giving directions that the two (2) Applications be canvassed and ventilated together.
11. On the other hand, the Parties also agreed to canvass and ventilate the two named Applications by way of written submissions. Consequently and in this regard, the court proceeded to and directed the Parties to file and exchange written submissions within a set timeline.

## **Submissions By The Parties**

### **a. Applicant's Submissions:**

12. The Applicant herein has filed two (2) sets of written submissions dated the 5<sup>th</sup> July 2023, respectively. In this regard, Learned counsel for the Applicant has raised various albeit assorted issues for consideration by the Honourable court.
13. Firstly, Learned counsel for the Applicant has submitted that the Applicant herein was never afforded due opportunity to be heard over and in respect of the subject matter. In any event, Learned counsel has contended that upon being served with the summons to enter appearance and Plaintiff, the Applicant herein instructed and engaged an advocate to protect her interests, but the advocate failed and/or neglected to file and serve Statement of Defense; and to summon the Applicant to attend court and testify.
14. Additionally, Learned counsel has contended that as a result of the failure or negligence by the Advocate who was retained to act on her behalf, same was denied and/or deprived of the requisite opportunity to be heard.
15. Consequently and in the premises, Learned counsel has therefore contended that the resultant proceedings and the Final Judgment, which was rendered by the Honourable court, was therefore an *Ex-Parte* Judgment and which is capable of being set aside and or varied pursuant to the provision of Order 10 of the *Civil Procedure Rules*, 2010.
16. In respect of the submissions that the proceedings that were undertaken and the resultant Judgment were *Ex-Parte* in nature; Learned counsel for the Applicant has cited and relied on various decisions, *inter-alia*, *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* (2014)eKLR, *Jaldesha Toke Dabelo v IEBC & Another* (2014)eKLR, *Richard Nchapi Leiyangu v IEBC & Others* (2013)eKLR, *Mbaki & Others v Macharia & Another* (2005) 2EA page 206 and *Patel v East Africa Consultancy Ltd* (1974) EA at page 74, respectively.
17. Secondly, Learned counsel for the Applicant has submitted that insofar as the impugned Judgment was an *Ex-Parte* Judgment, same therefore falls within the Jurisdiction of the court and is hence capable of being rescinded, set aside and or varied.



18. Furthermore, Learned counsel for the Applicant has contended that the Applicant herein did not file any Statement of Defense and therefore the resultant proceedings and the consequential Judgment were taken without the participation of the 2<sup>nd</sup> Defendant/Applicant.
19. Further and at any rate, the 2<sup>nd</sup> Defendant/Applicant has contended that this Honorable court is seized of the requisite mandate and Jurisdiction to set aside and or vary any *Ex-parte* Judgment/default Judgment, albeit on such terms as are deemed just, reasonable and or expedient.
20. Thirdly, Learned counsel has submitted that the suit property was bought and/or purchased by the Plaintiff/Respondent and the Applicant herein; who are the two known Directors of the 1<sup>st</sup> Defendant/Respondent.
21. Other than the foregoing, Learned counsel has contended that insofar as the suit property was bought and/or acquired by the two Directors of the company, the two Directors of the company therefore have a stake in the suit property.
22. Additionally, Learned counsel for the Applicant has contended that insofar as the suit property belongs to the 1<sup>st</sup> Defendant/Respondent, it is inappropriate and unjust for the Plaintiff/Respondent herein to be allowed to collect and retain all the monies recoverable from the suit property, which is situated in Diani, Kwale District.
23. Fourthly, Learned counsel for the Applicant has submitted that the Respondents herein shall not suffer any prejudice or at all; if the impugned proceedings and the resultant Judgment are set aside.
24. Further and in addition, Learned counsel has contended that once the Judgment is set aside, both the Parties herein shall be afforded an opportunity to file the requisite pleadings and thereafter to participate in the full hearing, with a view to straightening out the issue in dispute.
25. Finally, in respect of the Application dated the 5<sup>th</sup> June 2023; Learned counsel for the Applicant has submitted that it shall be in the Interest of Justice and overriding principles to have the default Judgment set aside and or varied; and to allow the Applicant an opportunity to file pleadings and to partake of the hearing, with a view to protecting her interest in the suit property.
26. Furthermore, Learned counsel for the Applicant has contended that the Applicant herein has been condemned unheard, contrary to and in contravention of the Rules of Natural Justice; Fair Hearing and Fair trial.
27. Arising from the foregoing, Learned counsel for the Applicant has therefore contended that it would be in the interests of Justice that the instant Application be allowed and not otherwise.
28. In support of the submissions pertaining to and concerning the need to afford the Applicant an opportunity to be heard, Learned counsel has cited and relied on *inter-alia* [Onyango Oloo v Attorney General](#) (1986)eKLR and [Mbaki & Others v Macharia & Another](#) (2005) 2 EA at page 206, respectively.
29. In respect of the Application dated the 22<sup>nd</sup> June 2023, Learned counsel for the Applicant has submitted that the subject dispute is also the dispute that is pending before the High Court vide Winding Up Cause over and in respect of the properties of the 1<sup>st</sup> Defendant.
30. For good measure, the Applicant herein has contended that the suit property, which is the subject of the instant matter; is the sole asset of the 1<sup>st</sup> Defendant, which is the subject of the winding up proceedings before the Honourable High Court.



31. Consequently and in the premises, Learned counsel for the Applicant has submitted that the dispute herein therefore ought to have been filed and or mounted before the High court in the winding up cause and not otherwise.
32. Secondly, Learned counsel has submitted that the suit property was purchased and acquired with monies from the two Directors of the company and thereafter same was transferred to and registered in the name of the company (read the 1<sup>st</sup> Defendant/Respondent).
33. Thirdly, Learned counsel for the Applicant has submitted that the filing of the instant suit by the Plaintiff/Respondent and particularly during the subsistence of High Court winding up Cause No. 23 of 2009; constituted an abuse of the Due process of the Honourable court.
34. Fourthly, Learned counsel for the Applicant has contended that insofar as the suit property forms part and parcel of the assets of the 1<sup>st</sup> Defendant; which is the subject of the winding up cause; then the instant suit ought to be transferred to the High Court and be joined together the winding up cause which is pending thereto.
35. In a nutshell, Learned counsel for the Applicant has therefore contended that it is appropriate and imperative that the instant suit be transferred to the High Court, winding up cause, to enable the dispute to be determined once and for all, by a court with competent Jurisdiction and not otherwise.

**b. Plaintiff's/Respondent's Submissions:**

36. The Plaintiff/Respondent filed written submissions dated the 20<sup>th</sup> June 2023; and in respect of which same has canvassed, highlighted and ventilated a plethora of issues for consideration by the Honourable court.
37. Firstly, Learned counsel for the Plaintiff has submitted that the Applicant herein was duly served with the summons to enter appearance and Plaint in respect of the instant matter. In addition, Learned counsel has averred that upon being served with the subject pleadings, the Applicant retained, engaged and instructed the firm of M/s Kounah & Company Advocate to enter appearance and file a Statement of Defense.
38. Furthermore, Learned counsel for the Respondent has submitted that during the proceedings before the Court, the duly appointed and instructed advocate who was retained by the Applicant duly filed a witness statement on behalf of the Applicant; and thereafter participated during the proceedings before the Honourable court.
39. Additionally, Learned counsel for the Respondent has submitted that the Applicant's advocate similarly cross examined the Respondent and thereafter same proceeded to and closed the Applicant's case, albeit without tendering any evidence on behalf of the Applicant herein.
40. Arising from the foregoing, Learned counsel for the Respondent has therefore submitted that the proceedings which were taken before this court culminating into the impugned Judgment, were not Ex-parte proceedings. Further, Learned counsel has contended that arising from the participation of the Applicant's advocate in the instant proceedings, it cannot be said that the resultant Judgment was an Ex-parte Judgment.
41. Secondly, Learned counsel for the Respondent has submitted that upon the delivery of the Judgment by the Honourable court, which Judgment was delivered on the 11<sup>th</sup> November 2019; the Applicant herein (sic) felt aggrieved and thereafter proceeded to and filed a Notice of Appeal to the Honourable Court of Appeal and in respect of which same signified her desire to appeal to the Court of Appeal.



42. Additionally, Learned counsel for the Respondent has submitted that other than the lodgment of the Notice of appeal, ( details in terms of the preceding paragraph) the Applicant herein also proceeded to and filed a Substantive appeal vide Court of Appeal civil appeal No. E362 of 2020; and wherein same sought to challenge and or impeach the Judgment rendered on the 11<sup>th</sup> November 2019.
43. Insofar as the Applicant herein has hitherto filed and/or lodged an appeal to the Honorable Court of Appeal, Learned counsel for the Respondent has submitted that the Applicant herein cannot revert to this court and now be heard to seek an order for setting aside of the Judgment which was issued by the court.
44. Thirdly, Learned counsel for the Respondent has also submitted that upon the filing and lodgment of Civil Appeal number E362 of 2020; before the Honorable Court of Appeal, the Respondent herein filed an Application seeking to strike out the appeal insofar as same was filed out of time.
45. On the other hand, Learned counsel for the Respondent has also contended that upon being served with the Application seeking to strike out the Notice and record of appeal; the Applicant herein filed and Application before the Honorable Court of Appeal seeking an extension of time to deem the Notice of appeal and the Record of appeal as duly filed.
46. Nevertheless, Learned counsel for the Respondent has ventured forward and submitted that the application by and on behalf of the Applicant was heard and same was ultimately dismissed vide ruling rendered on the 27<sup>th</sup> July 2022.
47. Arising from the foregoing, Learned counsel for the Respondent has therefore contended that the instant Application constitutes and amounts to an abuse of the Due process of the Honourable court.
48. Fourthly, Learned counsel for the Respondent has also submitted that the instant Application has been mounted and or lodged with undue and inordinate delay, which delay has neither been explained nor accounted for by the Applicant. For good measure, Learned counsel for the Respondent has averred that the impugned Application has been filed after a duration for more than Four years from the date of rendition/ delivery of the Judgment sought to be impeached.
49. Further and in addition, Learned counsel for the Respondent has submitted that insofar as the Application has been filed with inordinate and unreasonable delay, same has therefore been defeated by the Doctrine of Latches.
50. Fifthly, Learned counsel for the Respondent has submitted that the Applicant herein is guilty of misrepresentation and distortion of facts pertaining to and concerning the subject matter. In this regard, Learned counsel for the Respondent has taken issue with the contention by the Applicant that same has just realized that Judgment was entered in respect of the instant matter; yet the Applicant herein was privy to and knowledgeable of the entry of Judgment, leading to the filing of the Notice and Record of Appeal in the year 2020.
51. Consequently and in view of the foregoing, Learned counsel for the Respondent has thus contended that the Applicant herein cannot be allowed to benefit from exercise of Equitable discretion, on the basis of Dishonesty and Perjury.
52. In support of the foregoing submissions, Learned counsel for the Respondent has cited and relied on numerous decisions, *inter-alia*, [Nabro Properties Ltd v Sky Structure Ltd and 2 Others](#) (2002)eKLR, [John Florence Maritime Ltd v Cabinet Secretary, Transport, Infrastructure & Another](#) (2015)eKLR, [George W M Omondi v National Bank of Kenya & 2 Others](#) (2001)eKLR, [Jasbir Singh Rai & Another v Talorchan Singh Rai & Others](#) (2007)eKLR, [HA v LB](#) (2022)eKLR, [Stephen Nyasangi Menge v Risper](#)



*Onsase* (2018)eKLR, *Suleiman Murunga v Nilestar Holdings Ltd & Another* (2015)eKLR, *Hosea Nyadika Mosagwe & 2 Others v County Government of Nyamira* (2020)eKLR and *Saaid Sweilem Geitham Saanum v The Commissioner of Land (Being Sued through The Attorney General & 5 Others* (2015)eKLR.

53. Having cited and relied on the various decisions, which have been highlighted in the preceding paragraphs, Learned counsel for the Respondent has thereafter implored the Honourable Court to find and hold that the instant Application constitutes and amounts to the abuse of the Due process of the Honourable court and thus same ought to be dismissed with costs.

### **Issues For Determination**

54. Having reviewed the two named Applications and the rRsponses thereto; and having similarly taken into account the written submissions filed by and on behalf of the respective Parties, the following issues do arise and are thus worthy of determination.
- a. Whether the Proceedings taken before this Honorable court and the resultant Judgment were Ex-parte in nature, capable of setting aside or otherwise.
  - b. Whether this Honourable court has the requisite Jurisdiction to entertain and adjudicate upon the current Application seeking to set aside the Judgment long after the Applicant had preferred and mounted an Appeal to the Court of Appeal
  - c. Whether there is a suit in existence capable of being transferred to the High Court; either in the manner sought or at all.

### **Analysis And Determination**

#### **Issue Number 1**

#### **Whether the proceedings taken before this Honorable Court and the resultant Judgment were Ex-parte in nature, capable of setting aside or otherwise.**

55. It is common ground that upon being served with the summons to enter appearance with Plaintiff as pertains to the instant matter; the Applicant herein who is the 2<sup>nd</sup> Defendant to the main suit proceeded to and instructed the firm of Kounah & Company Advocates to file the requisite pleadings and documents on her behalf.
56. Furthermore, evidence abound that on the 11<sup>th</sup> July 2018; Learned counsel appearing for the Applicant herein sought for and obtained leave of the court to file and serve a Statement of Defense and witness statement for an on behalf of the 2<sup>nd</sup> Defendant.
57. For good measure, the order of the Honourable court made on the 11<sup>th</sup> July 2018; was couched in the following terms;
- “ The Interested Party to be the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant to file statement of defense within 14 days. Both Defendants to file and serve their witness statement and documents within 21 days. Mention on the 13<sup>th</sup> August 2018 before the Deputy Registrar for pre-trial direction”
58. First forward, the subject matter was fixed for mention before the Honorable Judge on the 26<sup>th</sup> February 2019; and on which date Learned counsel for the 2<sup>nd</sup> Defendant/Applicant informed the



Honourable court that same had not filed the witness statement. However, same sought for 7 days within which to file and serve the witness statement on behalf of the 2<sup>nd</sup> Defendant.

59. Following the plea by Learned counsel for the 2<sup>nd</sup> Defendant, the Honorable court proceeded and made the following orders;

“Hearing on the 30<sup>th</sup> May 2019. Defendants granted leave to file their witness statements and documents within 10 days, failing which the suit will proceed for hearing without them calling any evidence”

60. Clearly and from the foregoing, it is evident that the 2<sup>nd</sup> Defendant/Applicant was granted due latitude and opportunity to file and serve, *inter-alia*, the statement of defense, the witness statement and bundle of documents, if any and where necessary.

61. Be that as it may and despite having been granted the indulgence and latitude by the Honorable court, the 2<sup>nd</sup> Defendant herein appears to have been reluctant and/or disinclined to comply with the orders and directions of the court.

62. Notwithstanding the foregoing, it is imperative to observe that when the matter came up for hearing on the 30<sup>th</sup> May 2019, Learned counsel for the 2<sup>nd</sup> Defendant was present and indeed participated in the hearing. For good measure, Learned counsel for the 2<sup>nd</sup> Defendant cross examined the Plaintiff herein and upon the close of the Plaintiff's case, Learned counsel for the 2<sup>nd</sup> Defendant made the following remarks;

“We are not calling any witness. We close our case”

63. Pursuant to and as a result of the representation made by Learned counsel for the 2<sup>nd</sup> Defendant, the Honorable court proceeded to and closed the 2<sup>nd</sup> Defendant's case. Instructively, the closure of the 2<sup>nd</sup> Defendants case was at the request and instance of Learned Counsel for the 2<sup>nd</sup> Defendant.

64. Subsequently, the Honorable court ordered and directed that the Parties concerned to file and exchange their written submissions within a set timeline. In this respect, it suffices to underscore that submissions were filed by all the Parties, including the 2<sup>nd</sup> Defendant herein.

65. Invariably, it was imperative to supply the foregoing background, so as to discern whether or not the proceedings which were taken before this Honorable court as well as the resultant Judgment, were *Ex-Parte* in nature and thus amenable to setting aside pursuant to and in line with the provision of Order 10 of The [Civil Procedure Rules](#), 2010.

66. However, from the reproduction whose details are alluded to in the preceding paragraphs, there is no gainsaying that indeed the proceedings were carried out and undertaken inter-partes. Further and in addition, the resultant Judgment was a final Judgment arising from the consideration of the merits of the cases presented by the respective Parties.

67. In my humble view and from the foregoing, there is no gainsaying that the proceedings and resultant Judgment are not Ex-parte proceedings, either in the manner alluded to or at all. In this regard, I surmise, that the impugned Judgment is not one such Judgment that lends itself to being set aside, varied and/ or rescinded pursuant to and in line with the provisions of Orders 10 and 12 of the [Civil Procedure Rules](#), 2010.

68. To this end, it is my finding and holding that the impugned application that seeks to set aside the Judgment is thus misconceived and otherwise an abuse of the Due process of the Honourable court;



and in any event; same is intended to invite this Honourable court to sit on appeal on the Judgment of a court of concurrent Jurisdiction.

69. Without belaboring the point, such an invitation would amount to an absurdity and thus same must be frowned upon and be deprecated by Every conscientious Judge, keen to uphold the Rule of Law and in particular, the Constitution of the Republic of Kenya.
70. To underscore the position that this Honourable court cannot set aside and or re-engage with a merit-based decision of a Court of concurrent Jurisdiction, it is instructive to adopt, restate and reiterate the succinct holding by the Court of Appeal the case of Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR, where the court stated and held thus;

In Civicon Limited v. Kenya Revenue Authority & Another [2014] eKLR, Muriithi, J., after examining various decisions on the subject, expressed himself quite strongly on the impropriety of parties attempting to reopen and relitigate decided issues in original form through the subterfuge of clothing them in constitutional garb;

I agree with the judicial policy that is variously set out by the authorities relied by the 2nd respondent-Peter Ng'ang'a Muiruri v Credit Bank Ltd & Anor, Court of Appeal Civil Appeal No. 203 of 2006 and Ventaglio International SA and Anor v. The Registrar of Companies and Anor, Nairobi HC Constitutional Petition No. 410 of 2012 (per Lenaola, J) that the High Court's Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of the Constitution. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See Beta Healthcare International Ltd v Commissioner of Customs, and 2 Others. Nairobi HC Petition No. 125 of 2010 (per Majanja, J.)”

I am in agreement with that analysis which I approve of. It is not difficult to see that the petition filed by the appellant against the Judges fell in the category of proceedings castigated and the learned Judge was well-entitled to uphold the objection against it.

71. In my mind, it would be a disguised appeal, if I were to purport to set aside the considered Judgment and decision of a court of concurrent Jurisdiction, which was arrived at after due consideration of the merits of the evidence and submissions placed before the said Judge.
72. In short, I decline the invite herein, which in any event, is intended to cause violence to the Rule of law and the General administration of Justice, whose tenets, includes, inter-alia, that Judges of concurrent Jurisdiction cannot sit on appeal on considered decisions of the other Judge.



## Issue Number 2

### **Whether this Honourable Court has the requisite Jurisdiction to entertain and adjudicate upon the current Application seeking to set aside the Judgment long after the Applicant has preferred and mounted an Appeal to the Court of Appeal**

73. Other than the fact that the impugned proceedings and the resultant Judgment were not *Ex-parte* proceedings, there is still yet another serious issue that warrants mention and appropriate deliberations.
74. For good measure, it is on record that upon the delivery of the Judgment, the 2<sup>nd</sup> Defendant herein proceeded to and lodged a Notice of Appeal wherein same signified her intention to challenge the Judgment and decree of the Honorable court.
75. Further and in addition, the 2<sup>nd</sup> Defendant also filed a letter bespeaking proceedings to enable same to compile and file the requisite Record of appeal. For good measure, the Letter bespeaking proceedings was dated the 25<sup>th</sup> November 2019; whilst a Notice of appeal was also filed on even date.
76. Subsequently, the 2<sup>nd</sup> Defendant herein proceeded to and ultimately filed a Record of appeal before the Honorable Court of Appeal, which appeal was admitted and assigned as Court of Appeal civil appeal No. E362 of 2020.
77. Other than the foregoing, it is also important to recall that upon the filing of the impugned appeal, the counsel for the Respondent herein took out and filed an Application to strike out the appeal. However, before the Application to strike out the appeal could be heard and disposed of; the 2<sup>nd</sup> Defendant herein filed an Application seeking for extension/enlargement of time, most probably to validate the impugned Appeal that have been filed.
78. Be that as it may, the Application for extension/enlargement of time, which was filed by and on behalf of the 2<sup>nd</sup> Defendant herein was heard and disposed of vide the Ruling rendered on the 27<sup>th</sup> July 2022. For good measure, the application under reference was dismissed.
79. Nevertheless, it is not clear as to what ultimately happened to the appeal which was filed by the 2<sup>nd</sup> Defendant before the Court of Appeal. However it is instructive to underscore that an appeal was indeed filed before the Court of Appeal challenging the Judgment of this court, albeit differently constituted.
80. In view of the foregoing, the question that does arise is whether a Party who has since filed an appeal to the Honorable Court of Appeal; can thereafter revert to the court of first instance and seek to set aside the Judgment which was/ is the subject of Appeal, before the Honourable Court of Appeal.
81. To my mind, the moment a litigant, the Applicant herein not excepted, files an appeal before the Court of Appeal, same is divested of the right and/or mandate to return to the superior court and seek to impeach the same Judgment which is the subject of appeal.
82. The foregoing position may appear so established and elementary, but the 2<sup>nd</sup> Defendant/ Applicant in her wisdom has gained and garnered the courage to approach this Honourable court to perhaps become the Supreme Court; and invalidate proceedings that are pending before the Court of Appeal.
83. Fortunately, this Honourable Court is alive to the hierarchical structure of Judiciary as established vide Articles 163 and 164 of the *Constitution*, 2010; and I must point out that Parties like the 2<sup>nd</sup> Defendant; should not endeavor to abuse the Due process of the court, for the sake of it.



84. Nevertheless, I beg to point out and to reiterate for that matter; that this Honorable court is devoid of Jurisdiction to entertain and to re-engage with the issues at the foot of the current Application; long after the Applicant has filed Court of Appeal civil appeal No. E362 of 2020.
85. Further and in the absence of Jurisdiction, a court of law is called upon to down his/her tools. Instructively, the position as pertains to lack of Jurisdiction was highlighted by the Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited v M. Thiga t/a Newspaper Service* [2019] eKLR, where the court held thus;
- “ 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside *ex debito justitiae*. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.”
86. In a nutshell, I find and hold that this Honourable court is devoid and bereft of the requisite Jurisdiction to entertain and adjudicate upon the instant Application, which *ipso facto* is a nullity, for all intents and purposes.

### Issue Number 3:

#### **Whether there is a suit in existence capable of being transferred to the High Court either in the manner sought or at all.**

87. In respect of the Application dated the 22<sup>nd</sup> of June 2023, the Applicant herein has sought to persuade this Honourable court to transfer the instant suit to the High Court of Kenya, Commercial Division-Milimani; for purposes of consolidation with HCC Winding Up Cause No. 23 of 2009.
88. From the heading of the application, it appears that the prayer for transfer of the instant suit to the High court is premised and anchored on the provision of Section 18 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
89. However, it is instructive to point out and underscore that the provision of Section 18 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; governs the withdrawal and transfer of suits from the subordinate court (sic) to the High Court and Court of Equal status; or the transfer of suits from the High court (and courts of equal status) to the subordinate courts, competent to try such a suit.
90. To the contrary, the provision of Section 18 of the *Civil Procedure Act*, (*supra*) does not found the transfer of (sic) a suit from the High court to another High court; or from a court from Equal status to the High court, either in the manner sought or at all.



91. To be able to understand the import and tenor of the provisions of Section 18 of the *Civil Procedure Act*; same are reproduced as hereunder;

Power of High Court to withdraw and transfer case instituted in subordinate court

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
  - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
    - (i) try or dispose of the same; or
    - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
    - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

92. From the foregoing, I beg to point out and reiterate that I would not be obliged and obligated to facilitate the transfer of this suit to the High Court, either in the manner sought or all, under the guise of invoking Section 18 of the *Civil Procedure Act*.
93. Nevertheless, even assuming that I had the requisite Jurisdiction to transfer the subject suit to the High court (which, unfortunately I do not have); there would still be yet another obstacle.
94. For good measure, the obstacle herein relates to the fact that the instant suit which the Applicant is seeking to have transferred to the High court, if at all, was heard and disposed of vide Judgment rendered on the 11<sup>th</sup> November 2019.
95. Consequently and in the premises, there is no gainsaying that the suit that was filed before this Honorable court was fully heard and determined and hence, there is no more suit that is capable of being transferred (sic) to the High court or at all.
96. Notably and to my mind, the delivery of a Judgment in a suit terminates and or concludes the suit. Thereafter, one cannot be able to talk about a suit, capable of being transferred for whatsoever purpose. In this regard, the prayer to transfer the instant suit, is certainly stale and redundant.

**Final Disposition:**

97. Arising from the deliberation highlighted in the body of the Ruling, there is no gainsaying that the two (2) Applications; filed and or mounted by the 2<sup>nd</sup> Defendant/Applicant herein are misconceived, bad in law and otherwise Legally untenable.



98. Consequently and without belaboring the point, the Application dated the 5<sup>th</sup> June 2023; and the 22<sup>nd</sup> June 2023, respectively, are devoid of merits and hence worthy of Dismissal. In this regard, same be and are hereby Dismissed with costs to the Plaintiff/Respondent.

99. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

In the Presence of;

Mr. Metto for the 2<sup>nd</sup> Defendant/Applicant

Ms. Nduta Kamau for the Plaintiff/Respondent

N/A for the 1<sup>st</sup> Defendant/Respondent

