



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 52 OF 2019

WILFRED ONTUBE MAKORI.....APPELLANT

VERSUS

KENYA ELECTRICITY TRANSMISSION CO. LTD.....1ST RESPONDENT

JEREMIAH ONDIGI MAKORI.....2ND RESPONDENT

RULING

1. The ruling relates to a preliminary objection to an appeal filed on 29th May 2019. The objection filed on 29th June 2020 raises the following grounds:

1. This Honorable court lacks jurisdiction to hear & determine the Appellant's Appeal dated 29th May 2019 by virtue of Article 162 (2) of the Constitution of Kenya and Section 13 of the Environment and Land Court Act.

2. This Honorable Court has no jurisdiction to entertain this Appeal by virtue of the rules established in Karisa Chengo & 2 Others v Republic [2015] eKLR.

2. The objection was canvassed by written submissions. The respondent submitted that **Article 162 (2) (b)** of the Constitution and **section 13 of the Environment and Land Court Act** gives the Environment and Land Court jurisdiction to handle matters arising out of environment, title and land. They also cited the case of **Karisa Chengo & 2 Others v Republic (supra)** where the court held that “*the ELRC and ELC are courts of equal status, autonomous of each other and each exercise peculiar jurisdiction*”. They sought to have the appeal dismissed for lack of jurisdiction.

3. The appellant submitted that the High Court and the Environment and Land Court are both of the same status and therefore this court is at liberty to transfer the matter to the proper court being the Environment and Land Court. They cited the case of **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR** and **Pamoja Women Development Programme & 3 others v Jackson Kihumbu Wangombe & another [2016] eKLR**.

DETERMINATION

4. The objection raised by the respondent is against this court's jurisdiction to hear and determine the appeal filed by the appellant. It is trite law that jurisdiction must flow from either the constitution, or legislation or both. In **Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the Supreme Court stated thus: -

“A Court's jurisdiction flows from either the constitution, or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where the constitution exhaustively provides for the jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

5. Both the Constitution and the Environment and Land Court Act contain the relevant provisions on the jurisdiction of the Environment and Land Court. **Article 162(2)(b)** of the **Constitution of Kenya** provides as follows: -

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -

a...

b. The environment and the use and occupation of, and title to, land.”

Section 13 Environment and Land Court Act provides as follows:

“(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 written law 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 relating to environment and land, including disputes-

a) Relating to environmental planning and protection, trade, 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 interests in land; and

e) any other dispute relating to environment and land.”

6. The appellant in her submissions concedes that this court lacks jurisdiction to hear the appeal and proposes to have the appeal transferred to the Environment and Land Court. The issue of Jurisdiction is thus not contested and the only issue that remains for this court’s determination is whether the matter should be struck off or otherwise transferred to the Environment and Land Court as proposed by the appellant.

7. The appellant in advancing its position that the matter ought to be transferred to the ELC court cited the case of **Pamoja Women Development Programme (supra)** where the court held as follows;

“... The High Court is still vested with inherent authority and inherent (incidental) jurisdiction to transfer certain suits which have been filed in good faith in the High Court to Equal Status Courts even in the absence of a specific statutory text bequeathing such powers to the High Court. This is in keeping with the Constitutional commandment to do substantive justice without undue obsession with technicalities.”

Similarly, in **Henry Kigen & 6 others v Baringo County Governor & 2 others [2020] eKLR** the Court stated that;

“I would agree that the proper course having regard to the overriding objection of the civil process and to Article 159 principle of substantial justice is to transfer a matter to the more appropriate or correct court, as the case may be, so as to avoid expensive delays in the substantive determination of disputes.”

8. Having considered these two persuasive authorities, the relevant laws on jurisdiction of the Environment and Land Court as well as the circumstances under which the appeal was filed before this court, I must admit that this matter calls for a different approach other than that adopted by the court in **Pamoja Women Development Programme (supra)** and the **Henry Kigen case (supra)**.

9. In my view the Constitution and the Environment and Land Court Act No.19 of 2011 stipulate that the appeals such as the one before me should be filed before the Environment Land Court. This fact is conceded by the appellant in her submissions who recognizes that the proper forum for the appeal is the Environment and Land Court. The Environment and Land Court Act No.19 of 2011 came into force on 30th August, 2011. The appeal was filed on appeal filed on 29th May 2019 seven years since the Act came into force. Kenyans including the appellant’s counsel are now well-acquainted with the appropriate forum for filing claims relating to environment and land as I note that the matter was initially filed before the Employment and Land Court before it was transferred to the lower court for hearing and determination.

10. The Court of Appeal in **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR** held that;

“And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.”
[Emphasis added]

11. It’s almost a decade since the Environment and Land Court Act No.19 of 2011 came into force and I am of the view that the citizenry is now well-acquainted with jurisdiction of the High Court, the Industrial Court or the Environment & Land Court as envisioned by the **Constitution of Kenya 2010**.

12. In the circumstance, I find that this court lacks the jurisdiction to entertain the appeal and consequently the appeal is struck out with costs to the respondent.

Dated, signed and delivered at KISII this 16th day of December 2020.

R.E. OUGO

JUDGE

In the presence of:

Miss Ndemo For the Appellant

Mr. Esibi For the 1st and 2nd Respondents

Ms. Rael Court Assistant