



REPUBLIC OF KENYA



**KENYA LAW**  
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**Hamisi v Yusuf (Environment and Land Appeal 65 of 2021)  
[2023] KEELC 20740 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20740 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 65 OF 2021  
SM KIBUNJA, J  
OCTOBER 18, 2023**

**BETWEEN**

**AZIZA SOUD HAMISI ..... APPELLANT**

**AND**

**FATMA SHEIKHAYA YUSUF ..... RESPONDENT**

***(NOTICE OF MOTION DATED THE 16TH MAY 2023)***

**RULING**

1. The respondent moved the court through the notice of motion dated the 16<sup>th</sup> May 2023 seeking for the Record of Appeal to be struck out with costs. The application is premised on the fourteen (14) grounds on the notice of motion marked (1) to (14), and supported by the affidavit of Fatma Sheikayah Yusuf, the respondent, sworn on the 16<sup>th</sup> May 2023 in which she inter alia deposes that the judgement subject matter of this appeal was delivered on the 27<sup>th</sup> August 2021, and the Memorandum of Appeal ought to have been filed by 27<sup>th</sup> September 2021, but none had been filed in this court; that the appellant filed a notice of motion dated 6<sup>th</sup> October 2021 before the High Court for extension of time, stay of execution, leave to appeal out of time and for the Memorandum of Appeal filed out of time to be deemed to have been filed in time; that the application was transferred to this Court by the High Court which had no jurisdiction to do so under Article 165(5)(b) of *the Constitution*; that the appellant filed a Memorandum of Appeal on 6<sup>th</sup> October 2021 in High Court Civil Application No. 170 of 2021 before the application for extension of time was granted; that some unknown person(s) then inserted the words “ELCA 65/21” on the 8<sup>th</sup> October 2021; that on the 24<sup>th</sup> March 2023, the appellant filed the Record of Appeal in High Court Civil Application No. 170 of 2021, long after the application had been invalidly and unlawfully transferred to this Court; that the registry staff at the High Court’s and this Court’s registries have no power to transfer appeals from one court to the other; that the appellant has not filed any appeal before this Court and the court has no jurisdiction to deal with the appeal that is not before it; that after the appellant failed to get exparte orders on the application filed before



the High Court, she filed a notice of motion dated the 15<sup>th</sup> October 2021 in Chief Magistrate ELC Case No. 1454 of 2016 seeking for similar orders of extension of time, stay of execution and for the Memorandum of Appeal filed in the High Court to be deemed to have been filed in time; that the Chief Magistrate granted the prayer for extension of time to file the appeal in the High Court; that the appellant did not disclose the existence of the application pending before the High Court; that the lower court had no jurisdiction to determine an application pending before the High Court or this Court; that the appellant had also not disclosed to this court after 7<sup>th</sup> October 2021 that she had sought for similar orders from the lower court and her conduct amounts to forum shopping and is a gross abuse of the courts process.

2. The application is opposed by the appellant through the replying affidavit of Aziza Soud Hamisi, sworn on the 15<sup>th</sup> June 2023 inter alia deposing that the Memorandum of Appeal dated the 5<sup>th</sup> October 2021 that was to be filed on or before 4<sup>th</sup> October 2021 was filed out of time on the 6<sup>th</sup> October 2021; that the High Court order transferring the appeal to this Court has not been set aside or reviewed; that the High Court has power to transfer a suit to the proper forum under Articles 165 and 159 of *the Constitution* as read with sections 1A and 1B of the *Civil Procedure Act*; that the High Court has taken the position that lack of jurisdiction is limited to the substantial handling of the dispute at hand but the act of transferring or referring a matter to the proper forum is an administrative function aimed at facilitating the speedy hearing and determination of the dispute at hand; that the file was forwarded to this Court's registry and allocated reference ECL appeal no. 65 of 2021 in compliance with the transfer order; that the high court and this Court are courts of concurrent jurisdiction on land and environment matters and the transfer of the appeal by the High Court to this Court was within the appropriate constitutional limits; that on the 22<sup>nd</sup> February 2022, the court in CMCC NO. 1454 of 2016 deemed the Memorandum of Appeal herein that had been transferred to this Court by the High Court as having been lodged in time and the appeal is therefore properly before the court; that the application dated the 5<sup>th</sup> October 2022 was rendered res judicata by the orders of 22<sup>nd</sup> February 2022, and the appellant will be seeking to have it withdrawn; that the respondent has not disclosed the prejudice she would suffer and the application should be dismissed as the appellant would suffer irreparable loss and damages.
3. The learned counsel for the respondent and appellant filed their submissions dated the 29<sup>th</sup> June 2023 and 11<sup>th</sup> July 2023, which are as summarized herein below;
  - a. The learned counsel for the respondent has submitted that in this appeal, no certificate of delay from the trial court in the issuing of the decree has been availed. That the decree in the Supplementary Record of Appeal [Further Record of Appeal] filed in June 2023 without the leave of the court, indicates that it was issued on the 24<sup>th</sup> May 2023. That the act of filing the appeal in the High Court and the decree issued some nine (9) months after the judgement without availing a certificate of delay renders the appeal incompetent, null and void. The counsel relied on the Court of Appeal decision in *Gregory Kiema Kyuna versus Marietta Syokau Kiema* [1988] eKLR, in support of their submissions that a Memorandum of Appeal should be filed with the decree within 30 days from the date of the judgement, and where it is filed outside 30 days, in addition to the decree, there must be a certificate of delay. That where a Memorandum of Appeal in an appeal filed within 30 days, but without a decree; or where it is filed outside the 30 days, without the decree and certificate of delay, then that appeal cannot be saved but has to be dismissed with costs. That an appeal from the decision of the lower court is filed in the superior courts and only the appellate court can admit an appeal filed outside the time. That accordingly, the order given in Mombasa CMC ELC Case No. 1454 of 2016 purporting to extend the time for filing the Memorandum of Appeal in the High Court



was null and void. That the High Court is expressly prohibited under Article 165(5)(b) of *the Constitution* from exercising jurisdiction over matters falling within the jurisdiction of this Court. Counsel referred to the case of *Gaikia Kimani Kiarie versus Peter Kimani Kiramba* [2020] eKLR, in which several other decisions dealing with section 18 of the *Civil Procedure Act* were cited and it was held that applications filed in courts without jurisdiction cannot be transferred and must be dismissed. That accordingly, the High Court should have struck out the application dated 6<sup>th</sup> October 2021 and the Record of Appeal dated 24<sup>th</sup> March 2023. That the registry staff of this court should not have handled the Record of Appeal filed in High Court Civil Application No. 170 of 2021 on 24<sup>th</sup> March 2023 as it had not been filed in this court. That the Appellant's explanation that the transfer of the documents in High Court Civil Application No. 170 of 2021 was administratively done should be rejected as this Court is not under the supervision of the High Court. That the existence of High Court Civil Application No. 170 of 2021 and ELC Civil Appeal No. E065 of 2021 makes it difficult to tell which proceedings this court is seized of, and the application should be granted.

- b. The learned counsel for the appellant inter alia submitted that the Memorandum of Appeal that ought to have been filed on or before 4<sup>th</sup> October 2021 was filed on 6<sup>th</sup> October 2021. That the order of 22<sup>nd</sup> February 2022 in Mombasa CMCC No. 1454 of 2016 deeming the Memorandum of Appeal transferred from the High Court to this Court as properly lodged on time has not been set aside or reviewed. That the appeal was transferred to this Court by the High Court suo moto, and the transfer order has not been reviewed, set aside or appealed against. That the appellant was not aware of the transfer of the appeal from the High Court to this Court until the 25<sup>th</sup> April 2023 when it was mentioned. That as the provisions of section 79G of the *Civil Procedure Act* do not limit the power to extend time to file appeal to the appellate court and the order in Mombasa CMCC No. 1454 of 2016 dated the 22<sup>nd</sup> February 2016 is still subsisting. That Order 42 Rule 1 provides for that "Every appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading", while Rule 2 provides that "Where no certified copy of the decree or order appealed against is filed with the Memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may direct." That the appellant filed the supplementary Record of Appeal that includes the decree after the court granted her leave to do so on the 25<sup>th</sup> April 2023. The counsel further submitted that the High Court, guided under sections 1A and 1B of the *Civil Procedure Act*, had power under Articles 165 as read with Article 159 of *the Constitution* to transfer the appeal to this Court. That the High Court and this court has concurrent jurisdiction in this appeal as the lower court matter was subject to a land sale agreement and payment of Kshs.6,000,000. Counsel referred to the case of *Tasmac Limited versus Roberto March & Others* [2013] eKLR, on concurrent jurisdiction. That transferring or referring a suit to the proper forum is an administrative function aimed at facilitating the speedy hearing and determination of the dispute at hand and the transfer of the appeal by the High Court to this Court was within the appropriate constitutional limits. That the registry allocated the appeal the ELC reference after the transfer order was brought to their attention. That the respondent's application should therefore be dismissed with costs.

4. The following are the issues for the court's determinations;

- a. Whether the Memorandum of Appeal and application filed before the High Court were regularly transferred to this Court.
- b. Whether there is a properly filed appeal before this Court.



- c. Whether the Memorandum of Appeal herein should be struck out.
  - d. Who pays the costs.
5. The court has carefully considered the grounds on the application, the affidavit evidence by both parties, the submission by both counsel, the superior courts decisions cited therein, the record and come to the following conclusions;

- a. The record confirms that this proceeding was commenced through the notice of motion under certificate of urgency dated the 5<sup>th</sup> October 2021 that is supported by undated affidavit filed on the 6<sup>th</sup> October 2021 at Mombasa High Court as Civil Application No. 170 of 2021. Also filed on the 6<sup>th</sup> October 2021 is a Memorandum of Appeal dated the 5<sup>th</sup> October 2021. The record further shows that the said application was placed before Lady Justice Njoki Mwangi, a judge of the High Court on the 7<sup>th</sup> October 2021 who directed as follows;

“...I have also read the affidavit in support thereof and the judgement by Hon. Kyambia dated 27<sup>th</sup> August 2021. It is clear to me that the present application is a matter that falls in the jurisdiction of the ELC. I therefore transfer the said matter to the ELC for consideration of the application dated 5<sup>th</sup> October 2021.”

It is therefore erroneous for the respondent to depose at paragraph 2 and 8 of her supporting affidavit that the application was dated the 6<sup>th</sup> October 2021 and that she failed to get the orders sought on that date. The application is actually dated the 5<sup>th</sup> October 2021, was filed on 6<sup>th</sup> October 2021 and the judge’s order was made on the 7<sup>th</sup> October 2021.

- b. The record further confirms that this matter was on the 14<sup>th</sup> February 2023 fixed for mention through email before this court on the 24<sup>th</sup> February 2023, but no party or counsel attended. The court directed for Notice to Show Cause under Order 17 Rule 6 of Civil Procedure Rules to be issued for the 26<sup>th</sup> April 2023, when counsel for both parties attended. The learned counsel for the Appellant submitted that they had filed and served the Record of Appeal but would be filing a supplementary record once they obtained an extract of the order from the lower court. The learned counsel for the respondent submitted that what follows a judgement is a decree and not an order. That on record was an application filed in 2021 in the High Court that was still pending. That the Record of Appeal that had also been filed in the High Court that had not been served upon his client. That the High Court judge transferred the matter to this court without giving the respondent an opportunity to be heard. That after the appellant failed to get the orders sought in her application from the High Court, she filed an application before the lower court and obtained an order extending time to file the appeal. That the High Court had no authority to transfer the appeal to this court and it should be struck out. The counsel for the appellant responded that the matter before the lower court was a money claim and that is why they filed the appeal in the High Court. That the High Court properly transferred the appeal to this court. That they had served the record of appeal but had not filed the affidavit of service. That after hearing counsel this court issued directions inter alia that the application and Record of Appeal that had been filed be served upon the respondent and affidavit of service be filed in seven days and that the respondent be at liberty to file and serve the intended application to strike out the appeal in 21 days.
- c. The record also confirms that a Record of Appeal dated the 24<sup>th</sup> March 2023 was filed on that same date in Mombasa High Court Civil Application No. 170 of 2021. That bearing in mind that the High Court had transferred the appeal to Environment and Land Court on the 7<sup>th</sup>



October 2021, and that the matter had been mentioned before this Court on the 24<sup>th</sup> February 2023, then the court is left wondering how the Record of Appeal that was filed in the High Court ended up on this file. It is therefore doubtful as to whether that Record of Appeal is properly filed before this court.

- d. That the time for filing appeals from the lower courts is provided for under section 79G of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya as follows;

“79G. Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

Superior courts have in many decisions expressed themselves on the duty of an applicant in an application for transfer of a suit under the provision of Section 18 of the [Civil Procedure Act](#) Chapter 21 of Law of Kenya that deals with the transfer of suits. Needless to restate, the suit must be in a court with jurisdiction. In the case of [Abraham Mwangi Wamigwi versus Simon Mbiriri Wanjiku & Another](#) [2012] eKLR, the court held that where a suit was instituted before a court with no jurisdiction, such a suit could not be transferred to a court with jurisdiction or the one it ought to have been properly instituted. That was because a suit filed in a court without jurisdiction was a nullity in law and whatever was a nullity in law, was in the eyes of the law nothing. That the court cannot purport to transfer nothing and make it something through an order of transfer. The court further stated that courts could only transfer a cause whose existence was recognized by law. It follows that if the High Court had nothing before it capable of being transferred and was without jurisdiction, then it had no power to transfer the matter to this court when it purported to do so on 7<sup>th</sup> October 2021.

- e. This court’s jurisdiction is as set out by [the Constitution](#) and statutes including Article 162(2) (b) of [the Constitution](#) of Kenya 2010 and section 13 of the [Environment and Land Court Act](#) No. 19 of 2011. The jurisdiction in the matters set out in the above provisions is exclusive to this Court and is it is therefore erroneous for the appellant to claim, as she appears to do in her deposition and submissions, that the High Court has concurrent jurisdiction with this Court on such matters. Article 165(5)(b) of [the Constitution](#) clearly provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2). The dispute before the lower court was evidently a matter falling within the jurisdiction of the Environment and Land Court and not High Court. The party aggrieved with the whole or part of that decision and wanted to file an appeal was obligated to lodge it before this Court, and not the High Court as the appellant herein did. As pointed out above, a suit filed in a court other than the one with jurisdiction is a nullity and incapable in law from being transferred to any other court. The order made on 7<sup>th</sup> October 2021 transferring this matter from the High Court to this Court was equally a nullity as the court was without jurisdiction in the matter before it. Further, the decision made in Mombasa CMC ELC No. 1454 of 2016, deeming as properly filed the Memorandum of Appeal filed out of time in Mombasa High Court Civil Application No. 170 of 2021, that is now Mombasa



ELCA No. 65 of 2021, was of no effect, as the Memorandum of Appeal had been filed in a court without jurisdiction.

- f. Under the provision of section 79G of the Civil Procedure Act, the forum of filing appeals from the subordinate courts' decisions is the High Court. In adherence to Article 259 of the Constitution and section 7 of the sixth Schedule thereof, the reference to the High Court should be read to include the Article 162(2) of the Constitution Courts, that is the Environment and Land Court and the Employment and Labour Relations Court. It is therefore the court where the appeal is to be filed that has the power to extend time for filing or admitting an appeal filed out of time upon "good and sufficient cause for not filing the appeal in time" being tendered, and not the subordinate court whose decision is subject matter of the appeal. What the subordinate court is obligated to do is to issue a certificate of delay, which an applicant may use in their application for extension of time or for the appeal to be admitted out of time. The order issued by the subordinate court in Mombasa CMC ELC No. 1454 of 2016 on the 22<sup>nd</sup> February 2022 was therefore issued by a court without jurisdiction and is hence a nullity.
  - g. It is strange that the appellant continued to file court documents before the High Court even after the order of 7<sup>th</sup> October 2021 transferring the matter to this court was made. It is also baffling how those documents, including the Record of Appeal filed on the 24<sup>th</sup> March 2023, were processed from the High Court to the Environment and Land Court registries without an order by the Judge or Deputy Registrar. The moment the appellant got to know she had filed her documents, including the Record of Appeal before the wrong forum, her recourse was to seek to withdraw such process and refile it in the proper court or court with jurisdiction. I therefore agree with the submission by the counsel for the respondent that there is no properly filed Record of Appeal before this court.
  - h. The drift from above findings points to one conclusion, that the respondent's application has merit. It follows that under the provision of section 27 of the Civil Procedure Act, that costs follow the event unless otherwise directed for good cause, the appellant will pay the respondent's costs.
6. Flowing from the foregoing, the court finds and orders as follows:
- a. That the Respondent's Notice of Motion dated the 16<sup>th</sup> May 2023 has merit and is hereby allowed as prayed.
  - b. The Memorandum of Appeal and the Record of Appeal dated the 6<sup>th</sup> October 2021 and 24<sup>th</sup> March 2023 respectively, are hereby struck out with costs as they are not properly before the Court.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 18<sup>TH</sup> DAY OF OCTOBER 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Appellant :Mr. Musyimi for Mulwa

Respondent : Mr. Muturi for Kinyua

Wilson – Court Assistant



**S. M. KIBUNJA, J.**  
**ELC MOMBASA.**

