



**Korir v Chepkwony & another (Environment and Land Appeal
8 of 2022) [2023] KEELC 21671 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL 8 OF 2022
MC OUNDO, J
NOVEMBER 23, 2023**

BETWEEN

DAVID KIPSIELE KORIR APPELLANT

AND

**SAMWEL KIPKOSKEI CHEPKWONY ALIAS KIPNGERCHER 1ST
RESPONDENT**

RICHARD KIPRONO TOGOM (BALIACH) 2ND RESPONDENT

RULING

1. Coming up before me for determination is a preliminary objection dated March 6, 2023 in which the respondents herein have opposed the transfer of the instant Appeal that was instituted in the High Court sitting in Bomet, to the Environment and Land Court where it ought to have been instituted in the first instance, as doing so would be contrary to the provisions of section 17 and 18 of the *Civil Procedure Act*. That the Appeal and application were fatally defective, misconceived, mischievous and an abuse of the court process and therefore unsustainable.
2. Despite there having been leave granted to the appellants to file their response to the said preliminary objection, the orders were not complied with.
3. Directions had been taken that the Preliminary Objection be disposed of by written submissions for which only the Respondents complied and filed their written submissions to wit that pursuant to the Appellants having filed the instant Appeal, which rose out of Sotik Principal Magistrate court being ELC No. 1 of 2018, at the Bomet High Court, the High Court had subsequently ordered that the matter be transferred to this court for hearing and determination.
4. The Respondent relied on the celebrated case of *Mukisa Biscuits Manufacturing Limited v West End Distributors* (1969) EA 696 to submit that their Preliminary Objection was merited. That the dispute was a land dispute in which the High Court sitting in Bomet had no jurisdiction to entertain, and/



- or determine the matter, to issue interim orders of stay and to transfer the matter to the Environment and Land Court.
5. That the court’s jurisdiction flowed from either the Constitution, the legislation or both as was held by the Supreme Court in the case of *Samwel Kamau Macharia v KCB & 2 others*, in Civil Application No. 2 of 2001.
 6. That when the Bomet High Court extended the interim orders herein, it in effect was entertaining the Appeal, which was contrary to the provisions of article 165(5) of the *Constitution* which clearly precluded the High Court from entertaining a matter that was the preserve of the ELC and ELRC. That the High Court erred in entertaining the Appeal herein by purporting to extend orders dated February 9, 2022 and therefore the said determination was amenable to be set aside *ex debito justitiae*.
 7. That section 18 of the *Civil Procedure Act* vested powers upon the High Court to transfer suits of a civil nature only when it had jurisdiction to handle the matter and when the court from which the suit is to be transferred from was clothed with jurisdiction to determine the matter. That a suit could not be transferred when the court in which it was filed did not have jurisdiction to determine it. That equally a court that lacked jurisdiction to determine a suit could not transfer a suit to another court.
 8. That the jurisdiction of the Environment and Land Court was clearly delineated by article 162(2) of the *Constitution* and section 13 of the *Environment and Land Court Act*. That the dispute in the trial court fell within the jurisdiction of the Environment and Land Court.
 9. The respondents relied on the decision by the Court of Appeal in the *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR to submit that where a suit was filed in court that did not have jurisdiction, the suit was incompetent and a non- starter and therefore could not be transferred.
 10. That this court therefore lacked the requisite jurisdiction to handle the incompetent matter and must down its tools. That the only remedy for the Appellant was to withdraw the Appeal and file a compliant suit in a court of jurisdiction.
 11. That the matter in the trial court being purely a land dispute and as held by the Supreme Court in its decision in *Republic v Karisa Chengo & 2 others* (sic), the Appeal before this court was not proper and should be dismissed.

Determination.

12. I have considered the Respondents’ application on a point of preliminary objection to the effect that the appellant’s appeal should be dismissed because it had been filed in the High Court at Bomet which court that did not have jurisdiction to hear matters touching on land disputes which was a preserve of the Environment and Land Court. That subsequently, the High Court had transferred the matter to this court being the court of competent jurisdiction when it still had no jurisdiction. There was no response to the preliminary objection.
13. The case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a Preliminary Objection where their Lordships observed thus:

“----a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary point may dispose of the suit. Examples are an Objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.



In the same case Sir Charles Newbold, P. stated:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

14. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable.

15. An Objection to the jurisdiction of the court has been cited as one of the Preliminary Objections that consists a point of law. Indeed the *locus classicus* case on the question of jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S”* (*supra*) where the Court held:

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. Judgment in the Principal Magistrate’s court in Sotik was delivered on the July 31, 2019, in which the determination was made pertaining the ownership of land parcel No. Kericho/Kipsonoi/855 and an order of permanent injunction issued thereafter. The Appellant, being dissatisfied with the decision of the trial Magistrate filed an Appeal in the High Court sitting in Bomet which Appeal was registered as High Court Civil Appeal No 18 of 2019, this despite the matter being purely a land dispute.

17. It is on record that the matter was placed before the High Court Judge sitting in Bomet who proceeded to preside over the same on the 11th March 2021 and July 8, 2021. On the February 7, 2022, the High Court issued a temporary stay of execution of the trial court’s judgment wherein two days later, on the February 9, 2022 the court, by consent transferred this matter to the Environment and Land Court with an extension of the interim orders.

18. Section 18 of the *Civil Procedure Act* bestows upon the High Court (read ELC) the powers to transfer suits of a civil nature. The said provisions of the law provides as follows;

“(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”.

19. The power to transfer a suit is discretionary and therefore a party seeking to transfer a matter from one court to another has the burden of providing sufficient reasons as to why the transfer is merited. However, a matter can only be transferred if the Court from which the Applicant is seeking to have the same transferred from, has jurisdiction over the said matter.

20. Section 13 of the *Environment and Land Court Act* gives the court power to hear and determine disputes relating to land use and other instruments granting any enforceable interests in land.

21. Having found that the matter before the trial court was purely a land matter, then it goes without saying that the High Court sitting in Bomet had no jurisdiction to entertain an Appeal arising therefrom which was a preserve of the Environment and Land Court. To this effect the said court could not purport to exercise powers granted to it under section 18 of the *Civil Procedure Rules* to transfer such Appeal that had been filed in a court that lacked jurisdiction, to a court having jurisdiction and therefore sanctify an incompetent Appeal. Indeed there was no competent Appeal before the said court capable of being transferred to this court.

22. Indeed the court of Appeal in the case of *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR had held as follows;

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even article 159 of the *Constitution* to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”

23. In the case of *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & another* [2012] eKLR, it had been held as follows:-

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing



and therefore the court cannot purport to transfer nothing and mold it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law.”

24. I find that the High Court ought to have downed its tools on realizing that this Appeal was the preserve of the Environment and Land Court, and thereafter to have directed the parties to file the same in the appropriate court. To this effect, the preliminary objection herein dated March 6, 2023 is allowed. I find that there is no competent Appeal pending before this court and the same is herein struck out with cost.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 23RD DAY OF NOVEMBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

