



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL CASE NO 133 OF 2016**

**ABDULMAJID MOHAMED ADAM.....APPEALANT**

**VERSUS**

**NIMISH SHAH T/A FLORA PRINTERS.....RESPONDENT**

**RULING**

1. This appeal was lodged in the High Court Registry on the 4/10/2016 by a memorandum of Appeal dated the same day. It is clearly an appeal from the determination of the Business, Premises Rent Tribunal in its Case No. 81 of 2011.

2. Some 23 days later, and by a Notice of Motion dated 25. 10. 2016, the appellant moved to court and prayed that the appeal be transferred to the Environment and Land Court on the basis that it was by an inadvertent error the appeal was filed in this registry rather than being filed in the Environment and Land Court Registry where it ought to have been lodged.

3. The application is supported by the affidavit of KHALID SALIM, Advocate, who depones that the error was that of his firm's legal clerk and was an innocent mistake. He adds in the affidavit that there is no prejudice to be occasioned to the Respondent if a transfer is ordered and that just determination can only be achieved by an order that the appeal be transferred.

4. The application was opposed by the Respondent who filed grounds of opposition whose gist was that an appeal filed in a court without jurisdiction is a nullity, cannot subsist and is therefore not eligible of a transfer. It is added on those grounds that the mistake couldn't be attributable to a clerical mistake as the heading of the Memorandum of appeal clearly show that it was intended to be filed at the High Court and not the Environment and Land Court and lastly that the court is not clothed with jurisdiction under section 18 of the Civil Procedure Act to order a transfer of a matter from itself to any court of equal status as it can only do that with a regard to a matter before a court of competent jurisdiction.

When the parties attended court on the 28/11/2016 to argue the application both parties had filed lists of authorities which founded their respective positions.

5. For the appellant application, the decisions in **DANIEL MUGENDI -VS KENYATTA UNIVERSITY** was cited for the proposition that any of the courts of equal status finding itself with a matter in which it forms the opinion that it has no jurisdiction ought to transfer such a matter to the court with jurisdiction. Similar reasoning was adopted in **WYCLIFFE MWANGAZA KALUNGWA -VS- GRAIN BULK [ 2014] eKLR, KENYA POWER AND LIGHTING CO. LTD -VS- NJUMBI RESIDENTS ASSOCIATION AND ANOTHER [2015] Eklr, and ELIJAH MOGIKA BWORO -VS – KISIL**

**BOATERS LTD [2016] eKLR** all of which were cited by the Appellant/Applicant for the proposition that the High Court has the power under its inherent jurisdiction and the oxygen principle to transfer a matter even if filed in a court without jurisdiction. In totality the appellant/applicant took the position that the need for proportionate, timely and costs effective determination of legal disputes dictate against striking out a matter merely because it is has been filed in a court without jurisdiction.

6. On behalf of the Respondent however Ms. Moolraj forcefully opposed the application on the grounds afore-stated and relied on the decision in **JAMES DAVIES NJUGUNA -VS- JAMES CHACHA [2013] eKLR**, **NDYKAK INVESTMENTS LTD -VS- JOSEPH IRUNGU KIMARU [ 2006] eKLR**, and **AINSWORTH WASWA KILONZO -VS- RUARAKA METALS LTD [ 2009] eKLR**, all for the proposition that a matter filed in a court without jurisdiction is a nullity and is incapable of transfer. All the three decisions cited by Mrs. Mooraj draw their jurisprudence from **KAGENYI -VS- MSIRAMO [ 1968] E A 48** which had been religiously followed by the Kenyan courts for the proposition that the High Court can only order a transfer of a mater if it was in the first place filed in a court of a competent jurisdiction.

7. The difference, beyond the jurisprudence, in the sets of decisions cited by both sides, however is that all the decisions cited by the respondent are by the High Court and can only be persuasive upon this court unlike the decision in **DANIEL MUGENDI (Supra)** which was by the Court of Appeal and carry with it a binding nature upon this court. To this court the shackles of procedural technicalities were sent to the back burners by the introduction into our procedural status the Oxygen principle and firmly outlined by the provisions of Article 159(d) of the Constitution. The court takes and has always taken the position and it is yet to deviate from the position that the only and all important purpose of the court system is to adjudicate disputes between the parties in a manner that rests such a dispute save for the litigants right to appeal.

8. In this instant case, I am being called upon to down my tools merely because I have no jurisdiction to determine a matter coming to this court by way of an appeal from the Business Premises Rent Tribunal and which the advocate regrets a mistake in so filling and pleads for a transfer if I were to do that, and may be penalize the appellant in costs, the dispute between it parties shall not have been rested.

9. What the appellant would do is hereby go to his computer, change the heading to read Environment and Land Court at Mombasa and refile the appeal the same day. In that event, shall have afforded to the dispute double judicial time in circumstances that can never be justified or justifiable. I shall have in that event doubled the costs of litigating the dispute unfairly and most of all I shall have added to the data of dispute pending before court for determination. All these to me are not in consonance with the purpose and objective of a Justice system and clearly give undue regard to procedural technicalities.

10. Additionally in making this determination on transfer, I am not considering the merits of the dispute in the appeal. I am doing a task a kin to directing where the matter shall be heard.

11. In our current legal and constitutional dispensation, this determination whether I allow or dismiss the application cannot be a determination of the appeal. To use Mrs Moolrajs expression, the moment I find that I have no jurisdiction, I have to down my tools. That to this court is an expression picked from that ratio classicus in owners of **M/V LILIAN "S" -VS- TOTAL KENYA [1989] KLR 1** as repeatedly followed by all courts up to the Supreme Court in **S K MACHARIA -VS- KENYA COMMERCIAL BANK & 20 OTHERS [2012]eKLR**. I must say that those decisions are, no doubt, very good law and have been followed constantly by the Kenya Courts and I dare say may be followed for a long time to come. However, what does the expression "down tools" mean?

12. To me the learned Judge, R.O. Kwach, to be precise, meant and can only be taken to have meant that once jurisdiction is established to be lacking, the court cannot purport to deal with the matter further. It cannot not be taken to mean that I just down my tools, the pen, and fold the file ad infinitum. That could result in a large numbers of files that are just folded, never to be touched because the court has downed its tools.

13. Such is the kind of a scenario that cannot be married to the constitutional dictate upon the court to be accountable to the sovereign, the people of Kenya. It is something that cannot be encouraged at all and must be frowned upon had it to occur.

16. This is the more reason that the court of appeal in DANIEL MUGENDI [ SUPRA] said unequivocally, convincingly and in no uncertain words that:

*“ And in order to do justice in the event where the High Court, the industrial court or the Environment and Land court come 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 equal/similar status should in the spirit of harmonization, effect the necessary transfers among themselves.”*

15. Being bound and guided by those very wise and well founded words of the court of Appeal, I chose prudence over imprudence and order that, the appeal be and is hereby transferred to the Environment and Land court, Mombasa for hearing and determination.

16. I order that the costs of the application shall abide the outcome of the Appeal.

Dated and delivered at **Mombasa** this **24<sup>th</sup>** day of **February 2017**.

**HON. P. J. O. OTIENO**

**JUDGE**