



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 168 OF 2011

1. STEPHEN KAVOO MWAU

2. MBAKA KITHUKA

3. FRANCIS MATIVO MANG'OKA.....APPLICANTS

VERSUS

JOSEPH MATHUKILU KIVUNGI.....RESPONDENT

*(Being an appeal from the Ruling of the Chief Principal Magistrate's Court at Machakos*

*of Hon S. Mungai (S.P.M) Civil Case No. 1495 of 2010 dated 28<sup>th</sup> October 2011)*

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*(Before B. Thurairaja J)*

### R U L I N G

1. The Respondent by way of a **Preliminary Objection** dated 18/7/2013 objected to the application dated 8/7/2013. The application dated 8/7/2013 sought an order of stay “suspending the effect and the operation” of the ruling dated 28/10/2011 delivered in **CMCC 1495/10** pending the hearing and determination of the application herein for the review of this court’s ruling dated 31/10/12 (**Makhandia, J**). The said ruling dismissed the Applicant’s application for stay pending the hearing and determination of the appeal.

2. The **Preliminary Objection** is based on the following grounds:-

- a. That this court’s jurisdiction has been ousted by the Environment and Land Court Act.
- b. That the question of stay is now *Res judicata* by virtue of this court’s ruling dated 31/10/2012.
- c. That the Appellants are guilty of *laches*.
- d. That the Applicants are guilty of contempt of court.

**e. That the ruling dated 31/10/12 has not been appealed against and is clear and unambiguous and no error exists on the face of the record.**

3. The **Preliminary Objection** was canvassed by way of written submissions which I have duly considered.

4. The question of this court's jurisdiction has been raised. As stated in **The Owners of Motor Vessel "Lillian S." –vs- Caltex Oil Kenya Ltd (1989) KLR 1:-**

**"Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."**

5. The **Practice Directions on Proceedings Relating to Environment and the Use and Occupation of, and Title to Land** issued by the **CJ in Gazette Notice No. 16268** of 9<sup>th</sup> November 2012 states as follows in Direction No. 3:-

**"All part heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court."**

6. Although the appeal herein is not part-heard, this court delivered the ruling dated 31/10/2012 which is the subject of the application for review. The application for review therefore falls within this court's jurisdiction.

7. The hearing of the application for review cannot be equated to the hearing of an appeal. This court cannot therefore be said to be sitting on an appeal on a ruling by a court of equal and concurrent jurisdiction.

8. The issue of *laches* is a question of facts and cannot be adequately addressed by a Preliminary Objection. Likewise, the question of contempt can only be addressed through contempt proceedings. As stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd. -Vs- West End Distributors Ltd (1969) EALR:-**

**"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."**

9. On whether the ruling dated 31/10/12 which is the subject of the review application is clear and unambiguous, that is the subject of the application dated 8/7/2013 which is still pending before this court.

10. This court's view is that the **Preliminary Objection** has no merits and is hereby dismissed with costs. The application dated 8/7/2013 to be fixed for hearing *interpartes* on priority basis.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this 25<sup>th</sup> day of **November** 2014.

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**B. THURANIRA JADEN**

**JUDGE**