



**Khator v Salim (Environment and Land Appeal E007 of 2023)  
[2024] KEELC 536 (KLR) (5 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 536 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E007 OF 2023  
LL NAIKUNI, J  
FEBRUARY 5, 2024**

**BETWEEN**

**ABDIKADIR ALI KHATOR ..... APPELLANT**

**AND**

**SAID MUSA SALIM ..... RESPONDENT**

**RULING**

**I. Introduction**

1. This ruling is in respect of the Notice of Motion application dated 14<sup>th</sup> July, 2023 by Abdikadir Ali Khator the Appellant/Applicant herein. It was brought under the provision of Article 170 (5) of the Constitution of Kenya, 2010, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act, Cap. 21.
2. Upon service, the Respondent, Said Musa Salim, instead preferred filing a Preliminary objection dated 9<sup>th</sup> October, 2023 contesting the jurisdiction of this Honourable Court.

**II. The Appellant/Applicant's case**

3. The Appellant/Applicant sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. Spent
  - d. That this Honourable Court be pleased to order stay of execution of the ruling delivered on 6<sup>th</sup> July, 2023 in Kadhi's Succession Cause No. 88 of 2008-In The Matter of the Late Ali Khator Salim and all consequential orders/proceedings and/or actions therein pending the hearing and determination of the present appeal herein.



- e. That this Honourable Court be pleased to order stay of proceedings in Kadhi's Succession Cause No. 88 of 2008-In the Matter of the Late Ali Khator Salim pending the hearing and determination of the present appeal herein.
  - f. That this Honourable Court be pleased to grant any further relief and/or order it may deem fit and just to grant in the circumstances.
  - g. That costs of this application be costs in the cause.
4. The application by the Appellant/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 14<sup>th</sup> Paragraphed Supporting Affidavit of Abdikadir Ali Khator sworn and dated 14<sup>th</sup> July, 2023 which was accompanied by two (2) annexures marked as 'AAK - 1 and 2' annexed herein. The Appellant/Applicant himself averred that:
- a. The ruling in the "Kadhi's Succession Cause no.88 of 2008 - in the matter of the Late Ali Khator Salim" was delivered on 6<sup>th</sup> July, 2023.
  - b. Being dissatisfied with the aforementioned ruling, the Appellant/Applicant herein lodged this present appeal at the Environment and Land Court against the whole of the aforesaid trial court's decision.
  - c. In the aforesaid ruling, the Learned Kadhi acted ultra vires his jurisdiction as donated by Article 170(5) of the Constitution of Kenya, 2010 and Section 5 of the Kadhi's Courts Act by vesting ownership of all that parcel of land known as No.8/3008 being an undivided share from Plot No. 284 Section III MN (hereinafter referred to as "The Suit Property") upon the Respondent.
  - d. Further in the aforesaid ruling, the Learned Kadhi acted ultra vires his jurisdiction as donated by the provision of Article 170(5) of the Constitution of Kenya, 2010 and Section 5 of the Kadhi's Courts Act by directing that the suit property be subjected to valuation and the current market value be paid to the Respondent by the Appellant/Applicant.
  - e. The Respondent was keen on enforcing the Learned Kadhi's unlawful and irregular orders as "Kadhi's Succession Cause no.88 of 2008 - in the matter of the Late Ali Khator Salim" was now scheduled to come up on 17<sup>th</sup> July, 2023 for purposes of depositing the title to the suit property in court for purposes carrying out the irregularly ordered survey.
  - f. Given that there were currently no orders staying of execution of the learned Kadhi's ruling delivered on 6<sup>th</sup> July, 2023, the Appellant is apprehensive that unless the proceedings of the Kadhi's Court are stayed, the Respondent will proceed with execution during the pendency of the appeal filed herein thereby rendering both the application herein and the present appeal nugatory
  - g. In light of the irregular manner in which the learned Kadhi has conducted the proceedings in "Kadhi's Succession Cause no.88 of 2008 - in the matter of the Late Ali Khator Salim" by issuing orders that are ultra vires his jurisdiction as donated by the provision of Article 170 (5) of the Constitution of Kenya, 2010 and Section 5 of the Kadhi's Courts Act, there was need to stay the said proceedings pending the hearing and determination of this appeal to avoid a miscarriage of justice.
  - h. The Appellant/Applicant was now apprehensive that unless the orders sought herein are granted, the Respondent would proceed with execution during the pendency of the appeal filed herein thereby rendering both the application herein and the present appeal nugatory.



- i. Given that the Appellant/Applicant herein had already lodged an appeal against the learned Kadhi's' ruling delivered on 6<sup>th</sup> July, 2023, there was real danger that both the present appeal and the application herein would be rendered nugatory if the orders sought are not granted.
- j. The Appellant/Applicant stood to suffer irreparable and/or substantial loss if stay of execution pending the hearing and determination of the present appeal was not granted as both this application and the appeal herein would be rendered nugatory.
- k. Unless this matter was certified urgent and the interim orders sought granted, the Appellant/Applicant shall effectively have been locked out of the seat of justice since its appeal if successful, shall be rendered a pyrrhic victory and an academic exercise.
- l. The Appellant/Applicant was ready and willing to furnish any such security as shall be directed by this Honourable Court pending the hearing and determination of the Appellant/Applicant's present appeal and as such, the Respondent should not be prejudiced in any manner.
- m. Unless the ruling delivered by the court on 24<sup>th</sup> November, 2022 and the subsequent orders thereto were stayed, the Appellant/Applicant's Appeal shall be rendered nugatory.

### **III. The Respondent's case**

- 5. The Respondent opposed the Notice of Motion application, the appeal and the proceedings through a Notice of Preliminary objection dated 9<sup>th</sup> October, 2023 on the grounds that:-
  - i. This matter being an appeal from the decision of the Kadhi's court in Succession Cause Number 88 of 2008 this Honourable court has no jurisdiction to entertain the same.

### **IV. Submissions**

- 6. On 17<sup>th</sup> July, 2023 while all the parties were present in Court, they were directed to first and fore most, have the Notice of Preliminary objection dated 9<sup>th</sup> October, 2023 be disposed off by way of written submissions. Depending on the outcome of the stated Ruling, Court will provide direction of the determination of the have the Notices of Motion application dated 14<sup>th</sup> July, 2023. Pursuant to that all the parties obliged. On 11<sup>th</sup> October, 2023 a ruling date was reserved on Notice by Court accordingly.

#### **A. The Written Submissions by the Respondent**

- 7. The Respondent through the Law firm of Messrs. H. A. Mwadzogo Advocates filed their written submissions dated 9<sup>th</sup> October, 2023. The Learned Counsel for the Respondent commenced their submissions by rehashing on the background of the matter. He stated that before this Honourable court was an Appeal against a decision by the Kadhi's court issued on the 6<sup>th</sup> July, 2023 in Kadhi's Court Succession cause Number 88 of 2008. It was filed vide a Memorandum of Appeal dated 14<sup>th</sup> July, 2023. Together with the Appeal was a Notice of Motion Application dated 14<sup>th</sup> July, 2023 where this Honourable court issued directions on its disposal on the 17<sup>th</sup> July, 2023. The Respondent had preferred to file a preliminary objection to dispose off the Application and the Appeal once and for all on the ground of jurisdiction.
- 8. The Learned Counsel submitted that on the face of record, this instant Appeal was against a decision of a Honourable Kadhi issued in Kadhi's Succession Cause Number 88 of 2008; in the Matter of the Estate of Ali Khator Salim (Deceased) between Abdikadir Ali Khator and Said Musa Salim. The Respondent herein advanced two (2) legal issues namely:-



- a. Whether this Honourable court has jurisdiction to entertain Appeal from the Kadhi's Court?
  - b. If a Court without jurisdiction could entertain and/ or even transfer a matter filed before it
9. Firstly, on whether this Honourable court has jurisdiction to entertain an Appeal from the Kadhi's Court, the Learned Counsel submitted that the broad jurisdiction of the Environment and Land Court is donated by Article 162 (2) (b) of the Constitution which provides that Parliament shall establish a Court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of and title to land. The Parliament indeed enacted the Environment and Land Court Act which gives this Court its jurisdiction under the provision of Section 13 of the said Act.
  10. It was the humble submissions of the Learned Counsel that the cause of action before the Kadhi's Court in Kadhi's Court Succession Cause Number 88 of 2018 was inheritance and distribution of the deceased estate and any party aggrieved with the decision of the Learned Honourable ought to have appealed against the same before the High Court Family Division and not before this Honourable court. The cause of action in this matter before the Kadhi's court was not under the ambit of Section 13 of the Kadhi's Court Act thus this Honourable court lacks jurisdiction to entertain this matter.
  11. In conclusion and on the issue of a Court without jurisdiction could entertain and / or even transfer a matter filed before it, the Learned Counsel argued that if this Honorable court agreed with the objection by the Respondent, the next fundamental question was whether this matter could be transferred. The Learned Counsel was guided by the court of Appeal decision in "Phoenix of East Africa Assurance Co. Limited -Versus - S M Thiga T/A Newspaper Service (2019) eKLR" where, the court status as follows: "Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint in the court seized with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction a court cannot confer jurisdiction on itself".

#### **V. Analysis & Determination.**

12. I have carefully read and considered the pleadings herein by the Plaintiff and the 1<sup>st</sup> Defendant, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
13. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
  - a. Whether the Preliminary objection dated 9<sup>th</sup> October, 2023 by the Respondent is merited?
  - b. Who will bear the Costs of the Preliminary Objection dated 9<sup>th</sup> October, 2023.

#### **Issue No. a). Whether the Preliminary objection dated 9<sup>th</sup> October, 2023 by the Respondent is merited**

14. The starting point is to define what a preliminary objection is. The case of "Mukisa Biscuits – Versus - West End Distributors Ltd (1969) E.A 696" held as follows:-

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as 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 the contract giving rise to the suit to refer the dispute to arbitration ...

Justice Newbold in the said suit argues that

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 had to be ascertained or if what is sought is the exercise of judicial discretion”

15. In this instant suit the Respondent has based his Preliminary Objection on the ground that this matter being an appeal from the decision of the Kadhi’s court in Succession Cause Number 88 of 2008 this Honourable court has no jurisdiction to entertain the same. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Appellant’s case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court in the “Matter of Interim Independent Electoral Commission [2011] eKLR” held as follows:

Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

(30) The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

16. The question that strikes my mind is whether this court can proceed to entertain a matter in which it has no jurisdiction. The issue of jurisdiction is key since without jurisdiction a court has no powers to proceed to entertain the matter and it has to down its tools. I am of the considered view that this matter is yet to be heard, the Respondent is within the law to raise his Preliminary Objection challenging the jurisdiction of this court. It is therefore my finding that the Preliminary Objection raised by Respondent is one on pure points of law that that this court needs to determine.
17. On whether the court has jurisdiction to hear and determine this suit, having determined that the Preliminary Objection by the Respondent is based on pure points of law, it will be important to determine whether this court lacks jurisdiction to hear and determine this suit.



18. The Learned Counsel for the Respondent submitted that the broad jurisdiction of the Environment and Land Court is donated by Article 162(2)(b) of the Constitution which provides that Parliament shall establish a Court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of and title to land and that the cause of action in this matter before the Kadhi's court is not under the ambit of section 13 of the Environment and Land Court Act thus this Honourable court lacks jurisdiction to entertain this matter.

19. According to the provision of Section 13, the Environment and Land Court Act provides that:-

13.

- (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 law applicable in Kenya 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;
  - a. relating to environmental planning and protection, 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.

20. I do take note that although the provision of Section 13 (2) (e) of the Act provides that jurisdiction of the court extends to 'any other dispute relating to the environment and land' the same ought to be understood within the context of the court's jurisdiction to deal with disputes connected to environment and the use and occupation of and title to land as captured under article 162 (2) (b) as well as the preamble to the Environment and Land Court Act which reads as follows:-

“An Act of parliament to give effect to Article 162 (2) (b) of the constitution; to establish a superior court to hear and determine disputes relating to environment and the use and occupation of and title to land, and to make provisions for its jurisdiction functions and powers and for connected purposes.”

21. The Black's Law Dictionary where the word 'use' is defined as being;

“The application or employment of something especially. a long continued possession of a thing for the purpose for which it is adapted, as distinguished from possession or enjoyment that is merely temporary or occasional.”

22. To qualify this Honourable Court's understanding of land use, I will consider the definition of land under the provision Article 260 of the Constitution as follows:-

“Unless the context requires otherwise, 'land' includes-



- a) The surface of the earth and the subsurface rock;
- b) Anybody of the water on or under the territorial surface
- c) Marine waters in the territorial sea and exclusive economic zones;
- d) Natural resources completely contained on or under the surface; and
- e) The airspace above the surface”

23. It is common ground that the jurisdiction of this court is set out under the provision of Article 162(2) as read together with Section 13 of the ELC Act, 2011 and that the same relates to the use occupation and title to land. However what is in dispute is whether the cause of action in this suit in which the Appellant has referred to this court is an appeal that falls under the Environment and Land Court or under the Family Court. The question the Honourable Court is left to ask itself if the final orders by the Kadhi Court.

24. Even though the provisions are clear that jurisdiction in land-related matters belongs to this court, I note that the said provisions are less clear on what “land-related” means. The determination on what land related means has been left for courts to interpret. In order to make a determination as to whether the issues before this Court are land related or not. My attention has been drawn to the decision in the case of “Suzanne Achieng Butler & 4 others – Versus - Redhill Heights Investments Limited & another [2016] eKLR”, which decision I agree with. In the said case the court stated that;

“In all honesty, it would not be possible for such direction to come from the Constitution or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here.

23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

25. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.

26. In my view, the following factors are significant in determining the nature of the contract:

- a. The language of the contract;
- b. The nature of the business of the vendor;



- c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials;
- d. The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and the remedies sought by the Plaintiff”.

25. Although the matters before the Honourable Court through the Preliminary Objection on pure issues of law by the Respondent, the Honourable Court has felt it needful to critically re – evaluate and assess the filed pleadings before the Khadhi’s Court. The Court has based its strength from the cases of *Selle & Another – Versus - Associated Motor Boat Company Limited & Others* (1968) EA 123 & *Kenya Ports Authority – Versus – Kuston (Kenya) Limited* 2009 2 EA 212). The contents of the application dated 28<sup>th</sup> July, 2022 by the Appellant supposedly sought to confirm him as the rightful owner of the parcel of the land known Number 8/3008 undivided share from the grand Plot number 284 Section II (CR No. 36405 allegedly having bought it from the late Ali Khator Salim. Further the Appellant sought from the Khadhi’s Court to have the deceased’s heirs be ordered to transfer the parcel of land in his name and that there be valuation of the suit property. Apparently, in its Ruling the Honourable Khadhi seems highly agitated by the fraudulent means of the Appellant obtaining some basic Court documents and also concealment of material facts. But be that as it may, I wonder how the Khadi’s Court would have been expected to make a determination on such a weighty issues as ownership of land belonging to a deceased’s estate through an interlocutory application as envisaged by the Appellant. From the very onset, the subject matter is one under the Estate of the deceased and hence its purely a succession matter on aspects of the distribution of shares and liabilities to the beneficiaries under Muslim laws. It is not a pure issue of the rights, interest and title of the land which belongs to the deceased. I fully appreciate that the membrane is rather too thin. Nonetheless, I hold that the issues from the appeal though weighty but rather premature. I discern that this Court would have to wait until the succession matters were fully settled by the Khadhi’s Court before embarking on the issues as stated out in this Appeal through the Memorandum of appeal. Through the Doctrine of Exhaustion and the provision of Article 159 (1) of the Constitution of Kenya, 2010, it is just fair, equitable and reasonable that the Khadhi’s Court is allowed to finalize the matter on succession before any other issue being taken up by any other Court whatsoever.
26. From the above case and using the Predominant Purpose Test, it would be paramount for me to determine the gravamen of the dispute between the parties herein and determine whether the same is rooted in contests about ownership, deficiency in title, occupation or use of the land or something else being distribution of assets and liabilities belonging to the Estate of the Deceased under the Muslim Law.
27. The Learned Counsel for the Respondent had in the alternative submitted that in the event that the court determines that it has no jurisdiction, it should transfer this matter to the High Court. However, I find that it would be futile for this Court to transfer the said suit to the High Court. I am of the view that jurisdiction is primordial and cannot be equated to a procedural technicality, and where a court lacks jurisdiction and has downed its tools, the same cannot be cured by Sections 1A, 1B and 18 of the Civil Procedure Act, 2010.



28. I make reference to the case of “Khaki Juma – Versus - Cecilia Mukami [2022] eKLR”, the Environment and Land Court in Nakuru held that:-

“The Kadhi’s court was a competent court and having made a determination on who the beneficiaries of the deceased were and who was entitled to inherit the suit property and the decision having not been appealed and/or set aside, the issues could not be tried by another court. They are Res Judicata. The issue of inheritance and ownership in regard to the suit property having been determined by the succession court, there was no other triable issue raised in the defence that would warrant the matter to go to trial. I am satisfied that the learned trial magistrate erred in his evaluation of the facts and the applicable law. The trial Magistrate in his ruling appeared to fault the considerations the Hon. Kadhi relied on in reaching the decision that he did. The court could not act as an appellate court against the decision of the Kadhi’s court. Appeals against the decision of the Kadhi’s Court on matters of succession lie to the High Court and not to the Environment and Land Court.” (Emphasis being mine).

29. In the case of:- “Phoenix of East Africa Assurance Co. Ltd – Versus - S M Thiga T/A Newspaper Service (2019) eKLR” the Court of Appeal while dealing with transfer of a matter from one court to another over question of jurisdiction, held as follows:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint in the court seized with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction on itself.”

30. Further the Court of Appeal in the case of:- “Equity Bank Limited – Versus - Bruce Mutie Mutuku t/ a Diani Tour & Travel [2016] eKLR” stated as follows:-

‘In numerous decided cases, courts, including this Court has 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.....’

31. This position was reinforced by the Supreme Court in the case of:- “Albert Chaurembo Mumba & 7 Others – Versus - Maurice Munyao & 148 Others (2019) eKLR” where the Court restated the position in in the case of “Kagenyi – Versus - Musiramo & Another (1968) EALR 43”, that an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. This Court is bound by the above-cited decisions.



Accordingly, I find that this Honourable Court has to down its tool at this point for lack of Jurisdiction to entertain the matter any further. It has become “functus officio” thereof.

**Issue No. c). Who will bear the Costs of Notice of Preliminary Objection dated 9<sup>th</sup> October, 2023.**

32. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus - Barclays Bank of Kenya Limited, eKLR (2014).
33. In this case, this Honourable Court finds that the Preliminary objection succeeds therefore the Respondent has the costs.

**VI. Conclusion & Disposition**

34. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience.
35. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
- a. That the Notice of Preliminary Objection dated 9<sup>th</sup> October, 2023 be and is hereby found to have merit is hereby upheld in its entirety.
  - b. That the Notice of Motion application dated 14<sup>th</sup> July, 2023 and all the subsequent orders granted by this Court be and are hereby struck out and set aside thereof on the account of the lack of jurisdiction of this Honourable Court.
  - c. That consequently to finding that this Honourable Court lacks jurisdiction, the Appeal be and is hereby struck out.
  - d. That the Respondent shall have the costs of the Preliminary objection.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 5<sup>TH</sup> DAY OF FEBRUARY 2024.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI,  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

**Ruling delivered in the presence of:**

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Ndambuki Advocate for the Appellant
- c. No appearance for the Respondent.

