



**Kenya Accountants and Secretaries National Examinations' Board v Chemng'orem & 4 others
(Environment & Land Case 2044 of 1993) [2023] KEELC 20546 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2044 OF 1993
OA ANGOTE, J
OCTOBER 5, 2023**

BETWEEN

**KENYA ACCOUNTANTS AND SECRETARIES NATIONAL EXAMINATIONS'
BOARD PLAINTIFF**

AND

**PAUL KIPKEMBOI CHEMNG'OREM 1ST DEFENDANT
THE COMMISSIONER OF LANDS 2ND DEFENDANT
THE ATTORNEY GENERAL SUED ON BEHALF OF THE DIRECTOR OF
SURVEY 3RD DEFENDANT
AD CAPITAL PROPERTIES GROUP LTD 4TH DEFENDANT
THE ATTORNEY GENERAL SUED ON BEHALF OF THE CHIEF LAND
REGISTRAR 5TH DEFENDANT**

RULING

1. The 1st defendant/applicant has moved this court through an application dated June 9, 2022, seeking that:
 - a. The Judgement signed by Nambuye JA on May 13, 2022 and delivered by Angote J. on May 19, 2022, be set aside as being null, void and of no legal effect, or alternatively, be declared to be a nullity.
 - b. Costs of this application.
2. The application is premised on the grounds that this case was part head by Nambuye J while she was a High Court Judge; that while this case was pending, in 2011, Nambuye J was elevated to the Court of



Appeal and that on being appointed as a Judge of the Court of Appeal, Nambuye JA ceased to have jurisdiction to hear and determine this suit.

3. According to Counsel, on 29th March and or April 20, 2012, the parties purported to confer jurisdiction on Nambuye JA to complete the hearing of this case; that jurisdiction cannot be confirmed on a court by consent of parties and that the hearing and the judgement signed by Nambuye JA on May 13, 2022, and delivered by Angote J on May 19, 2022, is a nullity.
4. The applicant's Counsel averred that the same opinion was held by the Plaintiff's Advocates, who expressed the same in a letter dated May 7, 2013 to the then Chief Justice.
5. The plaintiff opposed the application *vide* a notice of preliminary objection dated July 27, 2022, a replying affidavit sworn on September 23, 2022 and grounds of opposition dated September 23, 2022. It was averred by the Plaintiff that this court has no jurisdiction to deal with this application as the 1st defendant did not appeal against the consent letters dated 29th March and April 20, 2012 nor against the Chief Justice's directives in 2013, through which he directed Hon. Justice Nambuye to continue hearing the matter.
6. The Plaintiff further averred that this court has no jurisdiction to deal with the matter after the Judgement was delivered on 13th May 2022; that any substantive point of law arising therefrom can only be dealt with on appeal and that the court is *functus officio*.
7. In the replying affidavit, the plaintiff's counsel deponed that the 4th defendant filed a notice of appeal dated May 25, 2022 and a stay of execution application on June 9, 2022; that on June 15, 2022, the Court of Appeal adopted a consent letter dated June 27, 2022 in respect of the stay of execution application and that the issue of the jurisdiction of Hon. Justice CA Nambuye is an issue to be determined by the Court of Appeal.

Submissions

8. Through written submissions dated November 10, 2022 and further submissions dated May 8, 2023, the 1st Defendant's Counsel submitted that on being appointed a Judge of the Court of Appeal and on taking her oath of office, Hon. Justice Nambuye ceased to have jurisdiction to hear and determine this case.
9. Counsel submitted that under section 64(4) of the former Constitution, a Judge of the High Court on being elevated to the Court of Appeal was expressly granted jurisdiction to hear and determine all their part cases which were pending before such Judge. However, it was submitted, under article 164(3) of the current Constitution, no such jurisdiction is bestowed on a Judge who is subsequently elevated to the Court of Appeal.
10. Counsel submitted that it is trite that jurisdiction of a court of law can only be granted by the article 164(3) Constitution or an Act of Parliament. Consequently, it was submitted, the directive by the Chief Justice was illegal and unconstitutional. Counsel submitted that the continued hearing and judgement herein are both nullities as Nambuye JA no longer had any jurisdiction to hear and determine this case.
11. It was Counsel's submission that there is no appeal pending in the Court of Appeal challenging the jurisdiction of the judgement, nor has the 1st Defendant filed any Notice of Appeal; that the stay application filed by the 4th Defendant in the Court of Appeal was resolved between the 4th Defendant and Plaintiff on July 6, 2022, without involvement of the 1st Defendant and that there is no action pending appeal before the Court of Appeal between the 1st Defendant and the Plaintiff.



12. Counsel for the Plaintiff submitted that while Justice Nambuye had jurisdiction to determine this matter, this court cannot sit on appeal of a judgement issued by the High Court, which is a court of concurrent jurisdiction. Counsel relied on the case of *Sanitam Services Ltd v Rentokil and another* [2019] eKLR.
13. Counsel also submitted that this court has no jurisdiction to deal with this application as the 1st Defendant did not appeal against the Chief Justice’s directives in 2013 or the consent letters dated 29th March and April 20, 2012 and that the issues raised ought to have been appealed against within the statutory timelines. Counsel relied on the case of *Re Estate of Peninah Njeri Muthiora* [2021] eKLR and *Mary Njuguna v William Nabala* [2018] eKLR.
14. The Plaintiff’s Counsel further submitted that this court is functus officio and has no jurisdiction to deal with the matter after the Judgement was delivered on 13th May 2022. Rather, it was submitted, any substantive point of law can only be dealt with on appeal. Counsel relied on the case of *ICEA General Insurance Co. Ltd v Julius Chomba* [2020] eKLR.
15. Lastly, it was Counsel’s submission that the substantive parties in the dispute filed a consent dated March 8, 2023 on April 26, 2023 marking the suit as settled and that in view of the compromise, this court has no jurisdiction to determine this application.

Analysis and Determination

16. Upon consideration of the application filed by the Plaintiff, pleadings and submissions herein, the following issues arise for determination:
 - a. Whether this court has jurisdiction to deal with this application
 - b. Whether Hon. Justice Nambuye’s judgement should be set aside as being a nullity
17. The Plaintiff has sought orders that the Judgement by Hon. Justice Nambuye dated May 13, 2022 and delivered by Angote J. on May 19, 2022, be set aside for being null, void and of no legal effect, or alternatively, be declared to be a nullity. According to the Defendant, this court is bereft of jurisdiction in respect to the current application.
18. The locus classicus on jurisdiction is the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal stated:

“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. 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.”
19. A court’s jurisdiction flows from either the *Constitution*, legislation or both. This was articulated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya commercial Bank & 2 others*, [2012] eKLR:

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as



to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

20. The authority upon which the Plaintiff is seeking this court to exercise jurisdiction is amorphous and lacks legal basis. First, this application is not one for review of the judgement that was delivered by Nambuye JA, who was sitting as a High Court Judge, under section 80 of the *Civil Procedure Act*.
21. Second, it is clear that this is not an appeal against the impugned judgement, and lastly, as this court cannot sit on its own appeal, the impugned decision being the decision of this court.
22. This court cannot therefore consider the validity or otherwise of the judgement of another judge of equal status, or of the Court of Appeal. The only forum that can sit to consider the validity of the impugned judgement is the Court of Appeal.
23. Further, the Plaintiff, through its Replying Affidavit, has presented evidence that the judgement dated May 13, 2022 is the subject of appeal in the Court of Appeal. The Plaintiff has also presented a consent adopted by the Court of Appeal, whose effect is to stay the execution of the judgement in question.
24. Seeing as this matter is pending before another court with the requisite jurisdiction, this court is barred by the sub judice principle, provided under section 6 of the *Civil Procedure Act*, from trying or determining the issues raised in the application.
25. In conclusion, this court finds that it has no jurisdiction to determine the 1st defendant/applicant’s application dated June 9, 2022. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF OCTOBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Karanja for 1st Defendant/Applicant

Ms Githinji holding brief for Opiyo for Plaintiff

Ms Nyoboga for 4th Defendant

Court Assistant - Tracy

