



**Njoroge v Rukwaro (Environment and Land Appeal
E045 of 2022) [2025] KEELC 3977 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3977 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E045 OF 2022**

CG MBOGO, J

MAY 22, 2025

BETWEEN

ANN NJERI NJOROGE APPELLANT

AND

JAMES MWANGI RUKWARO RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated 15th October, 2024 filed by the respondent/ applicant, and it is expressed to be brought under Order 42 Rule 13 and Order 51 Rules 1 to 3 of the Civil Procedure Rules and Section 13 of the *Environment and Land Court Act* Cap 8D, seeking the following orders: -
 - i. That this honourable court be pleased to order that the court file in respect of this appeal be transferred to the Civil Division of the High Court for disposal of the appeal.
 - ii. That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that this court has no jurisdiction to hear this suit as the subject matter is a restitutionally claim as observed in the case of *Tauta & Others v Attorney General & 3 Others* [2015] eKLR.
3. The application is supported by the affidavit of the respondent/applicant sworn on even date. The respondent/applicant deposed that the appeal is against a judgment in his favour in a restitutionary claim which he made against the appellant in the trial court. He deposed that he had a land and monetary claim which succeeded partially, thereby changing the character of the suit fundamentally. Further, that whilst he filed a claim in the ELC division of the chief magistrates court, the effect of the judgment in his favour changed the jurisdiction of this court, since the appellant/respondent is against his monetary claim. He deposed that for this reason, the appeal should have been filed in the civil division of the high court. It was deposed that this is a suitable case for the transfer of the appeal from



this division to the high court, and that the appellant/respondent who is enjoying a stay of execution granted in this suit, has not filed any record of appeal two years after the appeal was filed.

4. The appellant/respondent filed grounds of opposition dated 20th January, 2025 challenging the said application on the following grounds: -
 - a. That the judgment in the lower court in favour of the applicant emanates from land issues which are intricately related and the appeal cannot be determined without reference to the alleged transactions.
 - b. That the main claim in lower court related to land and the claim for refund was in the alternative.
 - c. That this honourable court has jurisdiction to hear and determine the appeal.
 - d. That it is in the interest of justice that the application be disallowed/ rejected by this honourable court.
5. The application was canvassed by way of written submissions. The respondent/applicant filed his written submissions dated 29th January, 2025. He submitted that in the absence of a replying affidavit, the facts contained in his application must be taken as stating the truths. To buttress on this issue, reliance was placed in the case of Standard Resource Group Ltd v Attorney General & 2 others [2016] eKLR. Further, he submitted that the effect of the judgment of the lower court and the decision not to make a cross-appeal was to terminate the claim for title to land use, occupation and environment, and thereafter, the suit became one for money earned and received.
6. The respondent/applicant further submitted he cannot be faulted for filing a claim in the ELC court in the magistrates' court, and that once he elected an alternative claim which was granted, the effect changed the suit to a civil claim, and with no prayer touching on land. The respondent/applicant relied on the cases of Thakur Persad Jaroo v Attorney General (2002) Commonwealth Law Reports, 268, and Supreme Court Petition No. 5 of 2015; Republic v Karisa Chengo.
7. The respondent/applicant further submitted that once the lower court upheld the appellant's/respondent's claim to land, and the respondent got the alternative relief, any challenge of the claim could only be made in the civil court.
8. The appellant/respondent filed her written submissions dated 8th February, 2025. The appellant/respondent submitted that the main claim was in respect of Kitchen 20 on LR. No. 209/286-18, and that the declarations sought was to the use and occupation of the said property which involved money transactions that is the subject of the appeal. She submitted that in determining the appeal, this court must look at the land transaction and the purpose thereof, and it cannot be done without dealing with the land issue which was the substantive prayer in the lower court. In support thereof, the appellant/respondent relied on the case of Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR as quoted in the case of Frigoken Limited v Musotsi [2024] KEHC 10642 (KLR).
9. I have considered the application, the grounds of opposition and the written submissions filed as well as the authorities cited. In my view, the issue for determination is whether this matter ought to be transferred to the Civil Division for hearing and determination of the appeal.
10. It is not disputed that the respondent/applicant instituted a suit against the appellant/respondent at the chief magistrates' court in ELC No. E1495 of 2020. In a judgment delivered on 6th May 2022, the trial court found that the respondent/applicant was entitled to a refund of the money whilst the



appellant/respondent was entitled to the orders in the counter claim. Being dissatisfied with the said decision, the appellant/respondent filed a memorandum of appeal dated 2nd May, 2022 (sic) against part of the judgment in respect to the sum of Kshs. 5, 050,000/- awarded to the respondent/applicant.

11. The respondent/applicant argues that there being no cross-appeal, the outstanding issue that is contended is the sum awarded by the court, and in view of that, the court that is best suited to hear this dispute is the civil division. While this argument may be sound, it is important to adopt a broader interpretation of the jurisdiction of the court in dealing with matters emanating from subordinate courts on appeal. In this case, the main issue appears to revolve around ownership of Kitchen 20 on LR. No. 209/ 286-18. The parties herein testified for and against and in the end, the court pronounced itself as in the manner briefly stated above. The ownership through purchase of the property involved money transactions, and assuming that the claim fundamentally change because of a part of what is bargained is risky as to preempt the extent to which this court may wish to pronounce itself with respect to the grounds of the appeal.
12. In the end, it is my finding that the reasons advanced by the respondent/applicant are not persuasive to enable this court transfer this file to the civil division. The notice of motion dated 15th October, 2024 is thus dismissed. Costs in the cause.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 22ND DAY OF MAY, 2025.

HON. MBOGO C.G.

JUDGE

22/05/2025.

In the presence of:

Ms. Betty Cherono - Court assistant

Ms. Nduta Kamau holding brief for Dr. Kuria Kamau (senior counsel) for the Respondent/Applicant – present

No appearance for the Appellant/Respondent – present

