



REPUBLIC OF KENYA



**Yano & another v Mogona (Civil Appeal E020 of 2020)
[2024] KEHC 5733 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E020 OF 2020
JRA WANANDA, J
MAY 15, 2024**

BETWEEN

BENJAMIN KANDA YANO 1ST APPELLANT

SHADRACK KIPYATICH KIBOR 2ND APPELLANT

AND

ELIJAH MOMANYI MOGONA RESPONDENT

RULING

1. This Appeal arises from the Ruling delivered in Eldoret Chief Magistrate's Environment & Land Court No. No. 70 of 2018 on 30/10/2020 whereof the said suit which had earlier been dismissed for non-compliance with a Court Order, was reinstated. The suit involved a dispute over ownership of some parcels land. The Appellants were the Defendants in the suit and the Respondent was the Defendant. Aggrieved by the reinstatement of the suit, the Appellants filed this Appeal.
2. When this matter came up before me on 18/01/2024, Mr. Ngigi Mbugua, Counsel for the Respondent orally raised the challenge that this matter, being a land dispute matter that emanated from the Magistrate's Court sitting under its Environment & Land Court jurisdiction, ought to have been filed at the Environment and Land Court (ELC), and not at the High Court. Despite this being a clear, correct statement and undisputable statement, when the 2nd Appellant stood up to respond, he surprisingly insisted that the Appeal was in the right forum and that this Court should proceed to hear and determine it. I excused the 1st Appellant's statement noting that the Appellants are laymen acting in person and thus, may presumably not have appreciated the correct position of the law.
3. I then clarified the law to the Appellants and informed them that this Appeal was obviously filed in the wrong Court and cannot therefore be heard by this Court. I therefore informed them that the only issue remaining to be decided is whether to strike out the Appeal or to transfer it to the Environment and Law Court. Since the matter had only come for Mention, I restrained myself from making final



- orders on that date on suo motu basis and gave the parties liberty to move the Court in whatever manner they deemed fit. I then fixed the matter for Mention for 20/02/2024.
4. When the matter came up on 20/02/2024, it was brought to my attention that the Appellants had on 30/01/2024, filed the Notice of Motion of the same date seeking the following orders:
 - i. Spent [.....]
 - ii. That the proceedings of this Appeal be transferred to the Environment and Land Court (ELC) for hearing and determination by a Judge of competent jurisdiction.
 - iii. That the costs of this Application be in the Cause.
 5. The Application is expressed to be brought under Sections 24(a) and 18 of the *Civil Procedure Act* and Article 159(2)(d) of the *Constitution* of Kenya. It is then premised on the grounds stated on the face thereof and on the Supporting Affidavit sworn by the 2nd Appellant, Shadrack Kipyatich Kibor.
 6. In the Affidavit, the 1st Appellant deponed that on 10/12/2020, the Appellants filed a Notice of Appeal in this Court and the same was received and duly registered upon payment of the Court fees, that on 5/08/2021, the Deputy Registrar of this Court issued a letter to the Chief Magistrate requesting him to forward the original record of the suit with certified copies of proceedings, that upon receipt of the lower Court records, a Mention date for the Appeal was fixed, that to date, the Appellants have not received any complaints from this Court regarding jurisdiction, and that the Appeal has been in this Court for the last 4 years and it is only on 18/01/2024 that the Appellants learnt of the issue of jurisdiction.
 7. The 1st Appellant deponed further that the provisions quoted above give the Court the general power to transfer suits at any stage of the proceedings and even suo motu Court without any application by any party so that the ends of justice can be met, that the Appellants are opposing the striking out of the Appeal on the ground that they were not aware of the issue and that the error can be corrected by the Court as time is still available to do so, that the error was not advertent but was caused by the personnel in the Court Registry who received and registered the Appeal.
 8. In his response, Mr. Ngigi Mbugua informed the Court that he had filed Grounds of Opposition. I have not come across any Grounds of Opposition specifically filed in response to the instant Application but I have seen an earlier Grounds of Opposition dated 16/01/2024 filed by the Respondents in response to the Appellants' earlier Application dated 22/11/2023. That Application sought stay of proceedings of the lower Court suit pending hearing and determination of this Appeal but was subsequently withdrawn. I presume that the Respondent relies on the same Grounds of Opposition and have therefore not filed a fresh one. The Grounds of Opposition is premised as follows:
 - i. That the Application is misconceived, frivolous and an abuse of the Court process.
 - ii. That the application is defective in form and substance as it is filed in the wrong forum
 - iii. The Honourable Court has no power or jurisdiction to entertain the instant application as it is a land matter,
 - iv. That there exists a specialized Court to deal with any grievances that the Applicant might be having and as such the Applicant ought to move the appropriate Court.

Determination

9. The only issue that arises for determination herein is “this Appeal having been filed in the wrong Court, should it be struck out or should it be transferred to the Environmental and Land Court”.



10. Regarding the issue of jurisdiction, in the oft-cited case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi JA held as follows;

“With that I return to the issue of jurisdiction and to the words of section 20(2) (m) of 1981 Act, 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. Jurisdiction is everything. Without it a court has no power to make one step. Where act 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.

11. Similarly, in the case of *Samuel Kamau Macharia and another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court held as follows:

“[68]. 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 itself jurisdiction exceeding that which is conferred upon it by law.”

12. It is therefore trite law that the limits of the Court in exercising a particular jurisdiction must be ascertained before the Court can proceed with the matter any further.

13. Regarding the Environment and Land Court (ELC), Article 162(2) of the *Constitution* of Kenya empowered Parliament to “establish Courts with the status of the High Court to hear and determine disputes relating to:

- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.

14. Article 162(3) thereof then authorized Parliament to “determine the jurisdiction and functions of the Courts contemplated in clause (2).” Pursuant to Article 162(3), Parliament enacted the *Environment and Land Court Act*, No. 18 of 2011, Section 13(1) whereof outlines the jurisdiction of the Environment and Land Court (ELC) as follows:

- (2) In exercise of its jurisdiction under Article 162(2) (b) of the *Constitution*, the Court [the ELC] 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.

- (3)



15. Article 165(5) then provides that: -

“The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).”

16. In view of the above, the conclusion that this Appeal was filed in the wrong Court is therefore inescapable and incontestable.

17. Regarding this Court’s power to transfer a suit pending before it, Section 18(1)(a) of the Civil Procedure Act provided as follows:

1. On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage:-

(a) Transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same;

18. The dilemma of whether to strike out a suit filed in the wrong Court or to transfer it to the correct Court has been with us for a long time, Different Judges have taken different views of the matter. From my research however, I find that majority of Courts have embraced the view that once a suit is filed in a Court without the requisite jurisdiction, such suit is a non-starter, a nullity ab initio, as good as non-existent, and that there is therefore no mandate to transfer it.

19. For instance, in the case of Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & another [2012] eKLR, Odunga J (as he then was) held as follows:

“The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In *Kagenyi v Musiramo* (supra), Sir Udo Udoma, CJ made it clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. In *Ali Abdi Sheikh v Edward Nderitu Wainaina & Others* (supra), Koome, J (as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the *Civil Procedure Act* cannot be exercised in a matter where the suit was filed in a court without jurisdiction. A similar view was taken by the same Judge in *Rainbow Manufacturers Limited v National Bank of Kenya* (supra).

.....

It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further. That position was made clear by Nyarangi JA in *The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited* (1989) KLR 1,



20. Further in the case of *Boniface Waweru Mbiyu v Mary Njeri & another* [2005] eKLR, Justice J.B. Ojwang (as he then was), held as follows:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

21. Again, in the case of *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR, Bwonwonga J found as follows:

“Furthermore, according to *Kagenyi v Musiramo* and *Another*, supra, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.”

22. Similarly, L. Gaceru J in the case of *Gaikia Kimani Kiarie v Peter Kimani Kiramba* [2020] eKLR held as follows:

“Since the Applicant is seeking to transfer the suit based on the fact that the subordinate Court has no jurisdiction, then the Court finds that the Application is not merited as already held above by the Court. The suit is to be transferred from a Court with no jurisdiction, then it means it is not only an incompetent suit, but also a nullity in law and thus there is nothing to transfer. Consequently, the Court holds and finds that the Applicant has not satisfied this Court that it warrants the grant of the orders sought and therefore he is not entitled to the prayers sought.”

23. On my part, I am persuaded by the logic advanced in the cases cited above and I choose to follow them. I find that matters of jurisdiction are not mere technicalities of procedure but matters of substance since without jurisdiction, a Court cannot be said to be seized of a dispute for determination. Contrary to the Appellants’ submissions, lack of jurisdiction cannot therefore be cured by invoking the principle of the “overriding objective” under Article 159(2)(d) of the *Constitution* or Sections 1A and/or 1B of the *Civil Procedure Act*. In view thereof, the instant Application cannot succeed and is hereby dismissed.
24. Since the lack of jurisdiction of this Court to entertain this Appeal is apparent, the Appeal cannot also be left to stand. Accordingly, this Appeal is struck out with costs to the Respondent.
25. Before I “pen off” however, I must register my slight displeasure with the Respondent’s Counsel. It is clear that all along, he was aware that this Appeal was wrongly filed in this Court. He however chose to remain silent and wait to unleash the objection issue at an opportune time as his “secret weapon”. Although such a tactic may serve a party well on most occasions, it is not a good practice as it wastes precious judicial time, unnecessarily allows litigation to accumulate and causes wholly avoidable backlog. Had the objection been raised early enough, this Appeal would have been long determined and the parties would have long moved on. As a result of the tactic adopted however, this Appeal has remained active for a whole 4 years and wasted judicial time.



26. Had it not been that it was about such a crucial matter as jurisdiction, I would, for the above reasons, have considered invoking the Court’s inherent powers, the “overriding objective” of the law under Article 159(2)(d) of the Constitution and/or Sections 1A and/or 1B of the Civil Procedure Act as already referred to, and saved this Appeal.

Final Orders

27. The upshot of my findings above is as follows:
- i. The Appellant’s Notice of Motion dated 30/01/2024 is hereby dismissed.
 - ii. As a consequence, this entire Appeal is also struck out due to lack of jurisdiction.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF MAY 2024

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Both Appellants

No appearance for Respondent

