



REPUBLIC OF KENYA



KENYA LAW
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**Bosire v Weru (Civil Appeal E026 of 2022)
[2023] KEHC 27321 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E026 OF 2022
SN MUTUKU, J
SEPTEMBER 19, 2023**

BETWEEN

ERICK BOSIRE APPELLANT

AND

MARGINS NJERI WERU RESPONDENT

RULING

1. The Respondent in this Appeal has raised a Preliminary Objection (PO) dated 19th September 2022 to the Appellant's Application dated 29th August 2022, the Memorandum of Appeal dated 11th April 2022 and filed on 30th August 2022 and the entire Record of Appeal on the grounds that this court lacks jurisdiction to hear and determine the Application dated 29th August 2022 which is premised on a Memorandum of Appeal filed on 30th August 2022 that is defective and bad in law and secondly, that the entire application and Appeal are filed in contravention of the Civil Procedure Rules and as such this court lacks the requisite jurisdiction to hear and determine the same.
2. The application that necessitated the PO is the Notice of Motion dated 29th of August 2022 seeking stay of execution of the judgment delivered on 16th March 2022 pending the hearing and determination of that application and the intended appeal. This court directed that the application be served and parties to attend court for directions on 22nd September 2022.
3. When parties attended court, it was revealed that a PO had been raised on the application. I directed that the PO be determined first because it raised the issue of jurisdiction of this court to determine this matter. Parties were directed to file written submissions.
4. The Respondent's submissions are dated 19th October 2023 and filed on 1st November 2022. The Respondent has submitted that judgment of the lower court was delivered on 16th March 2022, but the Applicant did not file appeal within 30 days as the law requires; that he only filed this application



and memorandum of appeal on 30th August 2022 after expiry of 30 days. She submitted that this is disdainful and is in total disregard of section 79 G of the [Civil Procedure Act](#).

5. It is submitted that the Applicant did not seek leave of the court to file the appeal out of time or tender certificate of delay indicating that the inordinate delay was necessitated by the inability to acquire typed proceedings.
6. The Respondent has relied on [Partick Kiruja Kitinji v Victor Mugira Marete](#) [2015] eKLR where the court stated as follows on the issue of filing an appeal out of time without seeking leave from court to do so:

“In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To do otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159”.

7. The Respondent, further, cited [Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commissions & 7 others](#) [2014] eKLR where the Court stated that:

“...it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires.”

8. The Respondent has submitted that the ramifications of filing an appeal out of time without leave of the court is that the same is rendered a nullity as was stated by the Supreme Court that “no appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, the court will not accept a document filed out of time without leave of the court” (see [Nicholas Arap Korir Salat](#) case).
9. The Respondent urged that this court renders the Appeal incompetent and strikes it out for it denies this court the jurisdiction to hear and determine the same.
10. The Applicant’s submissions are dated 31st October 2022 and were filed on 1st November 2022. The submissions are brief. It is submitted that the Appellant filed an appeal on 12th April 2022 after being dissatisfied with the judgment of the lower court delivered on 16th March 2022 and that the subsequent application was filed to forestall the execution. He submitted that Record of Appeal has subsequently been filed and is awaiting directions.
11. The Applicant cited section 79G of the [Civil Procedure Act](#) to emphasize that the appeal was filed within time and therefore the PO raised in this matter is baseless and is based on lack of information on the part of the Respondent and his counsel.
12. I have considered the PO and the issues raised regarding the same. In [Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors](#) (1969) EA 696, what constitutes a preliminary objection was described by the court in the following terms:

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

13. To my mind, the issue of jurisdiction is one such point of law that, if argued, may dispose of the suit. Indeed, in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) eKLR, the court had this to say on jurisdiction.

“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 the other evidence. 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.”

14. I have read the documents in the court record. I have noted that there is a stamped memorandum of appeal dated 11th April 2022. It bears the court stamp of 12th April 2022. It is the same memorandum of appeal in the Record of Appeal. I have also noted an email sent to the Kajiado High Court Registry on Tuesday 12th April 2022 at 4.21pm forwarding a Memorandum of Appeal for filing and an outgoing email from the Registry to M/S Omariba & Company Advocates advising on the amount payable for filing and the methods of payment.

15. It is my view that the Applicant may have a point in what it is submitted in opposition to the PO. This court will give him the benefit of doubt. However, the problems facing the Applicant are not over. My reading of the record, especially the pleadings, the proceedings and the judgment of the lower court, reveals that the matter before the lower court was about a tenancy agreement between the parties. The trial magistrate stated in the judgment thus:

“Going back to the substance of this suit, parties were bound by the tenancy agreement dated 17/18 which stipulated the rent at Kshs 35,000 and deposit at Kshs 70,000. Secondly, such deposit could only be refundable upon issuance of 1-month notice in writing to the landlord.....”

16. To my mind, this was clearly a landlord/tenant relationship. Section 13 of the [*Environment and Land Court*](#) is clear on the issue as to where jurisdiction lies in matters landlord/tenant or issues of tent. This section provides that:

- (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.



- (3)
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court
17. I am alive to the fact that none of the parties have raised the issue of lack of jurisdiction of this court in respect to the matter being a rent related one. The issue of jurisdiction being raised by the parties in this matter pertains to the Application and the Appeal being incompetent for reasons that it was filed late without leave of the court. The question is whether this court would be in order to decide on a matter that has not been raised by any of the parties. I am guided by the Supreme Court decision in *The Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 and *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Court held that:
- “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.”
18. My understanding is that the right court with jurisdiction to try this appeal is not this court by the ELC by dint of section 13 of the *ELC Act*. Even though the parties have not argued this point, I would be failing them and the cause of justice if I were to allow this appeal to remain in this court when my understanding of the law is that this court is not clothed with the requisite jurisdiction to determine this matter.
19. I believe that I am called upon, in the exercise of my discretion, to advance the cause of justice and it would not be advancing that cause of justice if I were to let this matter remain and call upon the parties to address me on the issue of jurisdiction when it is clear to me that this court is not seized with the requisite jurisdiction to hear this matter. It will save judicial time and that of the parties if this matter is tried in the right court.
20. It is for the above reason that I make a finding that this court lacks jurisdiction to try this matter, not because of the reasons advanced in the PO but on grounds that this matter in the lower court concerned rent issues which issues are best handled by the ELC as provided under section 13 of the *ELC Act*. I will and do hereby exercise my discretion and transfer this matter to the ELC Kajiado for directions as to how the matter shall proceed.
21. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 19TH SEPTEMBER 2023.

S. N. MUTUKU

JUDGE

