



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 6 OF 2016

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the Ruling of Hon W. Juma (C.M) Delivered on 3rd August 2016 in Narok CMCC No. 25 of 2016)

TAJEU OLOLMAITAI.....1ST APPELLANT

JOHN TEELA MAITAI.....2ND APPELLANT

JULIUS OLONANA OLOMAITAI.....3RD APPELLANT

-VERSUS-

WANJIKU BABU.....RESPONDENT

RULING

Breaking the Yoke of Technicalities

1. It appears that, on 26/5/2021 when counsels in this matter appeared before me, were in agreement that this is land matter. They, however, differed on whether it should be transferred to ELC or be dismissed. Counsel for the Appellants argued that it should be placed before the ELC since at the time of filing the appeal the ELC was not in existence.

2. On the other hand, counsel for the Respondent prayed that this matter be dismissed or alternatively the Appellant should withdraw the matter and file it in ELC. The matter was filed in 2016 when ELC was not in existence.

ANALYSIS AND DETERMINATION

Issue

3. The dilemma in this application is; whether this appeal should be withdrawn, or dismissed, or transferred to ELC?

4. Questions of jurisdiction of the court have been raised at two levels; (i) that, at the very inception of the appeal, the court did not have jurisdiction; and (ii) as such, this court does not have jurisdiction to transfer the appeal to ELC. In short, it has been claimed that this court neither had the jurisdiction to hear the appeal, nor to transfer it to ELC.

5. There is not a doubt that under Article 165(5) of the *Constitution*;

“The High Court shall not have jurisdiction in respect of matters-

(b) Falling within the jurisdiction of the courts contemplated in Article 162(2).”

6. The ELC was established pursuant to **Article 162(3)** of the Constitution by Parliament through the Environment and Land Court Act. In particular, **Section 13(1)** declares ELC to have the requisite jurisdiction to handle this appeal. Thus, the first limb is settled.

7. The second limb is the dilemma; a kind that befell judges in tackling transitional challenges in respect of land and employment cases that had been filed in the High Court. Courts needed courage to break free from the bindings of a restrictive practice of the yore which suggested that this court could not transfer a matter to the right court if it was filed without jurisdiction. Judges took a more pragmatic approach pursuant to the power of the court to transfer cases and transferred the cases to ELC and ELRC, thereby, allowing substantive justice to take flight under the new Constitution, and, broke the yoke of superficial technicality-based justice that infested our judicial system. Notably, ELC and ELRC are courts with the status of the High Court.

8. See the case of *Daniel Mugendi vs. Kenyatta University*, where it was held that;

“And in order to do justice in the event where the High Court, the industrial court or the Environment and Land court come across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts, with equal/similar status should in the spirit of harmonization, effect the necessary transfers among themselves.”

9. Otieno J in *Abdulmajid Mohamed Adam vs. Nimish Shah T/A Flora Printers [2017] eKLR* while transferring a suit to the proper forum stated: -

“...However, what does the expression “down tools” mean "To me the learned Judge, R.O. Kwach, to be precise, meant and can only be taken to have meant that once jurisdiction is established to be lacking, the court cannot purport to deal with the matter further. It cannot be taken to mean that I just down my tools, the pen, and fold the file ad infinitum. That could result in a large number of files that are just folded, never to be touched because the court has downed its tools... Being bound and guided by those very wise and well-founded words of the court of Appeal, I chose prudence over imprudence and order that, the appeal be and is hereby transferred to the Environment and Land court, Mombasa for hearing and determination.”

10. Whereas this appeal was filed before the wrong court, I am prepared to deem the professional error- although it should be avoided- not to be so fundamental as to warrant a course that will occasion the appellant real trouble with the law, say, dismissal of the appeal; inextricable thereto is limitation of time which will impinge on the right of the party to seek relief in court.

11. In the upshot, I direct that this appeal is hereby transferred to the Environment and Land Court for hearing and determination.

12. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 19TH DAY OF JULY, 2021

F. M. GIKONYO

JUDGE

In the presence of:

1. Mr. Kinyajui for the Respondent

2. Mr. Kilele for the Appellants

3. Mr. Kasaso – CA

F. M. GIKONYO

JUDGE