



Clerknewell Investments Limited v Best Adventures Safari Limited (Environment and Land Appeal E012 of 2024) [2025] KEELC 4751 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E012 OF 2024
LN GACHERU, J
JUNE 26, 2025**

BETWEEN

CLERKNEWELL INVESTMENTS LIMITED APPELLANT

AND

BEST ADVENTURES SAFARI LIMITED RESPONDENT

(Being an Appeal from the Ruling and/ or Order of Hon. G. Sagero, Principal Magistrate in Narok delivered on 24th June 2024, in Narok CMELC No. 36 of 2018)

RULING

1. The Appellant herein filed this Appeal vide a Memo of Appeal dated 24th February 2025, wherein he sought for the Appeal to be allowed by setting aside, review and or upsetting the ruling and order of the trial court dated 24th June 2024, and substituting it with a ruling and / or order of allowing the Appellant's application for review on the award of interests in the Judgement of the court dated 28th July 2021, among other prayers.
2. The trial court had on its ruling of 24th June 2024, dismissed the Appellant's Notice of Motion Application dated 31st May 2023, wherein the Appellant had sought for review of the terms of the Judgement dated 28th July 2021, wherein the trial court had held that interest should run from the date of the Judgment instead of from the date of filing of the suit.
3. Being dissatisfied with the said ruling, the Appellant filed the instant Appeal vide the Memo of Appeal, wherein the Appellant averred that the trial court erred in both law and fact in failing to award the Appellant interest from the date of filing of the suit, and that the trial court failed to appreciate the principle governing review of judgements and orders of the court.
4. In opposing the instant Appeal, the 1st Respondent filed a Notice of Preliminary Objection dated 20th February 2025, wherein the 1st Respondent averred that the Appeal herein is fatally defective for



expressly offending the provisions of section 16 A of the [Environment and Land Act](#); that the Appeal is improperly placed before this court and amounts to a nullity that cannot be remedied by transfer pursuant to section 18 of the [Civil Procedure Act](#), or any other applicable provision of law.

5. The Respondent averred that the court has no jurisdiction to deal with this Appeal, and should be struck out.
6. The Appellant has vehemently opposed this Preliminary Objection through the Grounds of Opposition dated 25th March 2025, wherein the Appellant averred as follows; that the Appeal was properly drafted on 5th July 2024, for filing in the Environment and Land Court Registry, but was inadvertently filed at the High Court Registry instead of Environment and Land Court's Registry.
7. Further, that when the parties' advocates appeared before the High Court for Pre Trial Conference on 17th October 2024, the said Court on its own volition directed the transfer of the Appeal to this Court, and there is no Appeal against those directions of the High Court; further that this Preliminary Objection is res judicata, and that this court is being asked to sit on an appeal of a court of equal status/ jurisdiction; that the instant Appeal was filed within the stipulated time, and was not filed out of time and thus not contrary to section 16 A of the [ELC Act](#).
8. The Appellant also argued that the inadvertent error of filling the Memo of Appeal was an excusable mistake on the part of the advocate, and the same ought not to be visited upon his client; further, the court should uphold the principle and spirit of Article 159, of the [Constitution](#) of Kenya by preferring determination of the Appeal on merit, and not on technicalities, and thus the instant Preliminary Objection should be dismissed with costs.
9. The court directed the parties to canvass the instant Preliminary Objection through written submissions, which directions were complied with by the parties herein.
10. The 1st Respondent filed its submissions through Owino & Co Advocates, and urged the Court to dismiss the instant Appeal as the court lacks jurisdiction to determine the said Appeal, as the transfer of the Appeal from the High Court to this Court was a nullity, since the High Court lacks jurisdiction, and cannot transfer a matter it has no jurisdiction to determine, and thus the said defect is fatal.
11. It was its further submissions that this Preliminary Objection is merited, and the only remedy is for the Appeal to be struck out, and a fresh Appeal be filed before this Court to cure the defect. Further that a Court lacking jurisdiction cannot transfer a case to another Court, as such the suit herein is a nullity and cannot be cured by transfer.
12. The 1st Respondent relied on the case of [Phoenix of E.A Assurance Co .Ltd vs S.M Thiga t/a Newspaper Services](#) (Civil Appeal 244 of 2010) [2019] KECA 767(KLR)(CIV)(10th May 2019) (Judgement), wherein the court of Appeal echoed its own words in the case of [Equity Bank Ltd vs Bruce Mutie Mutuku t/a Diani Tours Travel](#) (2016) eklr, where the court held; -

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the [Civil Procedure Act](#) to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding



objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.”

13. The 1st Respondent also relied on the case of Boniface Waweru Mbiyu vs Mary Njeri & Another (2005) eklr, where the court held; -

“The entry point into any Court proceeding is jurisdiction. If a Court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question. In general the High Court is a Court of unlimited “original jurisdiction” (defined in *Black’s Law Dictionary*, 8th ed (2004) as “[a] Court’s power to hear and decide a matter before any other Court can review the matter”), but this does not mean, as counsel for the plaintiff has urged, that there is no time when this Court is without jurisdiction. Section 60 of the Constitution stipulates: “There shall be a High Court, which shall be a superior Court of record, and which shall have unlimited jurisdiction in civil and criminal matters...” While the High Court has unlimited jurisdiction, it is the correct legal position that the legislature, in exercise of its legislative powers, can, where necessary, limit this jurisdiction. Apart from the clear provisions of statute law that may limit the High Court’s jurisdiction, there will be principles of law established and recognised by the Court over the years, which define the mode of exercise of that jurisdiction.

I will, in agreement with the decision in *Kagenyi v. Musiramo*, state here that the High Court will decline to assume jurisdiction in relation to any matter which has been filed before a Court or tribunal lacking jurisdiction. 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.”

14. The Appellant filed its written submissions through Sheth & Wathigo Advocates and set out two issues for determination being;
- i. whether or not the court has jurisdiction to hear and determines the instant appeal;
 - ii). whether or not the Preliminary Objection dated 20th February 2025 is Resjudicata
15. The Appellant submitted that the impugned Ruling of the trial court was delivered on 24th June 2024, and the instant Appeal was filed on 9th July 2024, which Memo of Appeal was drafted for filing in the Environment and Land Court. However due to the inadvertent error on the part of the clerk filing on behalf of the advocate, he filed the said Appeal in the High Court Registry instead of ELC Registry. Therefore, the Appeal has not offended the provisions of section 16A of the ELC Act. Further, it was submitted that the Appeal was filed within 30 days stipulated in the ELC Act, and this Appeal is proper before the court.
16. Further, he contended that the issue raised by the 1st Respondent on the transfer of the Appeal is a mere technicality which should not be used to remove the Appellant from the seat of justice, and defeat



the course of justice. For this argument, reliance was sought in the case of *Zachary Okoth Obado vs Edward Akongo Oyugi & 2 others* (2014) eKLR, which cited the case of *Equitable Party & 2 others vs Independent Electoral and Boundary Commission* (2022) eKLR, where the court held; -

“In the Law Society case, this Court reiterated its earlier decision when it warned itself on a blanket invocation of Article 159 thus:

All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis *Raila Odinga and 5 Others v. IEBC and 3 Others*; Petition No. 5 of 2013, [2013] e KLR.

17. On the issue of filing the Appeal at the High Court Registry instead of the ELC Registry, the Appellant submitted that it was a mistake on the part of the Advocate, which mistake should not be visited upon the Appellant herein. Reliance was sought in the case of *CFC Stanbic Ltd vs John Maina Githaiga & Another* (2013) eKLR, where the court held; -

“On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of *Lee G Muthoga V Habib Zurich Finance (k) Ltd & Another*, Civil Application No. Nai 236 OF 2009, where this Court held:

“It’s a widely accepted principle of law that a litigant should not suffer because of his advocate’s oversight.”

In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.”

18. On whether the Preliminary Objection herein is Resjudicata, the Appellant submitted that the issue of transfer of the instant Appeal from the High Court to this court was dealt with by the High Court, and the said Court rendered a ruling, and allowed the transfer. Therefore, the issue of transfer cannot be raised again, since if the 1st Respondent was aggrieved, with the said transfer, he should have appealed that decision instead of raising a Preliminary Objection.
19. Further, it was submitted that raising the issue of transfer through this Preliminary Objection, the 1st Respondent is re-litigating an issue that is already addressed by court of competent jurisdiction. The Appellant relied on section 7 of the *Civil Procedure Act*, and the case of *Gladys Nduku Nthuku vs Letsbego Kenya ltd; Mueni Charles Maingi (Intended Plaintiff)* 2022] eKLR, and urged the court to dismiss the instant Preliminary Objection, with costs.
20. The Court has carefully considered the instant Preliminary Objection, the grounds for and against the said Preliminary Objection, the court record, and finds the issues for determination are;
- i. Whether the instant Preliminary Objection is Resjudicata;
 - ii. Whether the instant Preliminary Objection is merited.



Whether the instant Preliminary Objection is Resjudicata.

21. What is not in doubt is that the Appeal herein was initially filed at the High Court at Narok, and was given No. E017 of 2024. However, the heading reads “In the Environment and Land Court of Kenya at Narok.” With the above heading, it is very clear that the Appeal was intended to be filed in the ELC Court.
22. Further, from the court record, it is clear that on 17th October 2024, when the counsels for the parties appeared before the High Court Judge for directions, Mr Owino for the 1st Respondent informed the court that the Appeal was emanating from the ELC Lower Court, and Mr Murithii for the Appellant informed the court that the Memo of Appeal was filed in ELC Registry, and he wondered why it found itself in the High Court.
23. With the above argument, the High Court directed that the Appeal be transferred to this court taking into account the constitutional command to serve substantive justice and to facilitate access to justice. Therefore, from the above directions of the court, it is clear that the High Court Judge did transfer this Appeal from the High Court to this court on the court’s own motion.
24. From the Instant Preliminary Objection, it seems the 1st Respondent was not satisfied with the said transfer of the Appeal from the High Court, to this Court. The High Court is a Court of the same and/ or of equal status to this court, as provided by Article 162(2) of the *Constitution*. If the 1st Respondent was aggrieved by that decision of transferring the Appeal from the High Court to this Court, which from the heading was indeed meant to be filed in the ELC, then the 1st Respondent ought to have filed an Appeal against that decision, or even a review of the said decision of the High Court. By filing this Preliminary Objection, the 1st Respondent is asking this Court to sit on an Appeal of a Court of equal status and/ or concurrent jurisdiction.
25. The High Court dealt with the issue of transfer and made a ruling to that effect. Bringing the issue of transfer of the Appeal once again is equivalent to re-litigating the issue, and indeed that goes against the spirit of section 7 of the *Civil Procedure Act*, which provides; -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
26. This doctrine of Resjudicata applies to both suits and applications, and is a bar to re-litigating a matter that has already been determined by a court of competent jurisdiction. The High Court that transferred the Appeal herein is a Court of competent jurisdiction, and the said Court determined that the Appeal herein was fit to be transferred to this court. Therefore, the 1st Respondent is barred from raising the said issue of transfer once more.
27. In the case of *IEBC Vs Maina Kiai & 5 others* (2017) eklr, the Supreme Court had an occasion to decide on the issue of Resjudicata and held as follows; -

“The doctrine will apply only if it is proved that:

 - i. The suit or issue raised was directly and substantially in issue in the former suit.



- ii. That the former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title
 - iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and in the subsequent suit.”
28. Being guided as above, and considering that the transfer was directed by the court of competent jurisdiction, and of equal status to this Court, this Court finds and holds that the instant Preliminary Objection which challenges the transfer of this Appeal from the High Court to this Court is Resjudicata, and cannot be entertained by the Court herein.

Whether the instant Preliminary Objection is merited.

29. The 1st Respondent has also averred that the Appeal herein is fatally defective for expressly offending the provisions of section 16 A of the *Environment and Land Court Act*. This provision of Law provides;-
- 16A. Appeals from subordinate courts

- “(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the *Environment and Land Court Act* (Cap.8D), provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation of delivery to the appellant of a copy of the decree or order.
- (2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

30. It is the 1st Respondent’s argument that the Appeal herein was filed out of time, and thus has offended the above provisions of law. However, it is clear that the initial Memo of Appeal that was filed at the High Court Registry CTS, with a heading; “In the Environment and Land Court of Kenya at Narok,” is dated 5th July 2024, and was allegedly filed in Court on 9th July 2024. The impugned Ruling was delivered on 24th June 2024, and therefore, the Appeal that was inadvertently filed at the High Court Registry was filed within the 30 days as stipulated in section 16 A of the *ELC Act*.
31. Consequently, the argument that the Appeal herein offends the express provisions of section 16A of *ELC Act*, cannot hold water, and thus the Preliminary Objection herein is not merited, and the same is dismissed entirely with costs to the Appellant herein.
32. Having carefully considered the instant Notice of Preliminary Objection dated 20th February 2025, the Grounds of Opposition to the same, the rival written submissions, the Court finds and holds that the same is not merited, as it is Resjudicata. For the above reasons, this Preliminary Objection is hereby dismissed entirely with costs to the Appellant.
33. Let the instant Appeal be heard and determined on merit.

It is so ordered



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 26TH DAY OF JUNE, 2025

L. GACHERU

JUDGE

Delivered online in the presence of

Meyoki – Court Assistant

Mr. Murithi for the Appellant

Mr. Owino for the 1st Respondent

N/A for 2nd Respondent.

L. GACHERU

JUDGE

