REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 86 OF 2002

NEBERT ENGAILWA.....APPLICANT/APPELLANT

V E R S U S

JOEL LIHONDO KEGOLI.....1ST RESPONDENT

TOM KEGOLI.....2ND RESPONDENT

JOSEPH. E. KEGOLI.....3RD RESPONDENT

R U LI N G

1.The applicant/ appellant has filed an application dated 8th July, 2017 which application was filed in court on 27th July, 2018 seeking for orders that:

a. Spent.

b. That this Honourable court be pleased to stay the execution of the judgment herein or any other consequential orders pending the hearing and determination of this application.

c. That this Honourable court be pleased to set aside the judgment herein.

d. That this matter be transferred to the Land and Environment Court for hearing and final determination.

e. Costs be provided for.

2. The firm of **Fwaya & Co. Advocates** was appearing for the applicant/appellant while the firm of **Akwala & Co. Advocates** was appearing for the respondents.

3. The application is premised on the grounds on the face of the application and is supported by the affidavit of the applicant. The grounds in support of the application are that the matter was heard by Justice Sitati of the High Court. That when the matter came up for hearing and judgment his advocate Mr. Fwaya did not attend court. That mistake of counsel should not be visited on the applicant. Further that the matter relates to land. That when Sitati J heard the matter she did not have jurisdiction to hear and determine the matter. That at the time of the hearing and determination there was in place the Environment and Land Court established under article 162 of the Constitution of Kenya 2010 which court had the jurisdiction to hear the matter. That the decision by Sitati J was therefore made without jurisdiction and cannot stand. That the decision has occasioned miscarriage of justice as the respondent has commenced execution. That it is in the best interests of justice that the ruling of the court be set aside and the matter be transferred to the Environment and Land Court for hearing and determination.

4. The application was opposed by the respondents through the joint replying affidavit of Tom Kegoli and Joseph Kegoli, the 2nd and 3rd respondents respectively wherein they state that the applicant and his advocate appeared before Sitati J on several occasions when they did not raise the issue of jurisdiction. That they also appeared before the Deputy Registrar for taxation of the respondents' costs. Further that the matter commenced when the High Court had jurisdiction to hear land matters. Therefore that the court had the requisite jurisdiction. That it is the applicant/appellant who filed the matter before the court. That a party cannot file an appeal before a court and have it heard and determined only to thereafter turn around and purport to challenge the jurisdiction of the court after losing the case.

5. Further that the applicant's ground for review does not bring with it the protection of stay of execution as such protection is available in

the event of an arguable appeal existing . That the grounds for setting aside judgment or review under order 45 of the Civil Procedure Rules, 2010 do not include jurisdiction. Thus the court cannot review its own jurisdiction after judgment has been delivered. That the challenge of jurisdiction can only be by way of appeal and not review. That the application is really an appeal against the judgment which appeal has been filed out of time, irregularly and in the wrong forum.

6. The case herein involved the adoption of an award of Likuyani Division Land Disputes Tribunal. The subject matter was therefore land. The applicant/ appellant had filed the appeal against the decision of the trial magistrate in refusing to enter judgment in accordance with the decision of the said tribunal. After the applicant lost the appeal he filed the current application urguing that the court he had filed the appeal did not have jurisdiction to hear and determine the matter.

7. The application is brought under order 45 rules 1,2, and 3 of the Civil Procedure Rules. The rules provide that:-

> " 1. ***(1) Any person considering himself aggrieved-***
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> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence , was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for of any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

8. Justice Sitati is no longer stationed at this court. That is why the matter has come before me for the application for review.

9. The appeal was dismissed on the 15th June, 2016. The current application was filed in court on the 27th July, 2018 which is 2 years after the appeal was dismissed. An application for review under order 45 rule 6 of the Civil Procedure Rules ought to be made without unreasonable delay. A delay of 2 years cannot be said to be reasonable. The applicant has not explained the delay.

10. A court of law ought not and should not handle a matter where it has no jurisdiction. The Supreme Court in **Samuel Kamau Macharia & another Vs Kenya Commercial Bank Limited & 2 others (2012) eKLR** had the following to say on the question of jurisdiction of a court:

> " 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 to itself jurisdiction exceeding that which is conferred upon it by law. Where the constitution exhaustively provides for jurisdiction of a court of law the court must operate within the constitution limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon court of law beyond the scope defined by the constitution. Where the constitution confers power upon Parliament to set the jurisdiction of the court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such court… by statute law."***

11 In **The Owners of the Motor Vessel** " **Lilian S " Vs Caltex oil (K) 1989 KLR** at page 14,the late Nyarangi J held as follows:

> "***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 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… where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."***

12. Ojwang J (as he then was) in **Boniface Waweru Mbiyu Vs Mary Njeri & Another Misc App.No. 639 of 2005** held that:

> ***The entry point into any court proceedings 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 nulity. 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"*** *cited by Nambuye J in Protus Buliba Shikuku VS The Attorney General, Constitutional Reference No.3 of 2011, Kisumu.*

13. Article 162 (2) of the constitution of Kenya 2010 empowers Parliament to establish a court with the status of the High Court to deal with disputes relating to " the environment and use and occupation of, and title to land". Parliament in consequence thereof passed the Environment and Land Court Act No. 19 of 2011. Section 13 of the Act grants the court jurisdiction to hear and determine matters that include, inter alia, title to land. The parties herein have been involved in a protracted dispute over ownership of a parcel of land in Likuyani. The question is whether the High Court had jurisdiction to hear and determine the matter at the time that it did.

14. The application is based on the grounds that there is an error apparent on the face of the record that the court did not have jurisdiction to hear the appeal as the jurisdiction to hear the subject matter is conferred on the Land and Environment Court.

15. It is my considered view that a court can review its order where it is shown that the court did not have jurisdiction when it handled the matter. A question of jurisdiction can be construed to be an error apparent on the face of the record. The error must be an obvious one. In **National Bank of Kenya Vs Ndungu Njau, Court of Appeal Civil application No. 211 of 1996**, the court stated that:-

> " **A review may be granted whenever the court considers that it is necessary to correct apparent error or omission on the**

part of the court. The error or omission must be self-evident and should not require an elaborate urguement to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter nor can it be ground for review that the court proceeded on an incorrect exposition of the law"- See A. Ombwayo J in Grace Akinyi Vs Gladys Kemunto Obiri & Another (2016) eKLR.

16. Following the establishment of the Environment and Land Court Act in 2011 , and in exercise of powers conferred by the sixth schedule part 5 section 22 and Article 161 (2)(a) of the Constitution of Kenya 2010 and in pursuance of section 24, sections 30(1) and (2) of the Environment and Land Court Act (No. 19 of 2011) of the Laws of Kenya as read with section 31 of the Act and section 5(1) and 20 (c) of the Judicial Service Act(No. 1 of 2011) the then Chief Justice of the Republic, Mr. Willy Mutunga, made some practice directions contained in Kenya gazette No. 89 of 28th July, 2014. Orders 3 and 4 of the practice directions stated as follows:-

3. **All pending judgments and rulings relating to the environment and the use and occupation of, and title to land pending before the High court shall be delivered by the same court.**

4. All part- heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.

An earlier gazette notice No. 16268 dated 9th November, 2012 has similar provisions.

17. A perusal of the court file indicates that the appeal was filed at Kakamega High Court on 27/9/20002. The appeal was partly heard when the above said directions were made in 2012 and 2014. In the premises the High Court had jurisdiction to hear and determine the matter in accordance with the stated practice directions. There is thereby no error on the face of the record.

16. The applicant is the one who filed the appeal. He was represented by his advocates throughout the trial except that the advocates failed to turn up on the date of the judgment. This did not prejudice the appellant as he could obtain a copy of the judgment of the court and read it. For him to now turn around and purport that the court did not have jurisdiction after he lost the appeal is a manifestation of dishonesty on his part.

In the foregoing the court had jurisdiction to hear and determine the appeal. The application dated 8th July, 2017 is bereft of merit and is dismissed with costs to the respondents.

Delivered, dated and signed in open court at Kakamega this 18th day of October, 2018.

J.NJAGI

JUDGE

In the presence of:

Mr. Fwaya.....for applicant

No appearance.....for respondents

George.....court assistant

Parties:

Applicant.....absent

Respondents.....absent

30 days Right of appeal