



REPUBLIC OF KENYA



KENYA LAW
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**Be Energy Limited v Kyms Liquor Store (Environment and Land Appeal
3 of 2024) [2025] KEELC 169 (KLR) (21 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 3 OF 2024**

**MD MWANGI, J
JANUARY 21, 2025**

BETWEEN

BE ENERGY LIMITED APPELLANT

AND

KYMS LIQUOR STORE RESPONDENT

(In respect of the Appellant's Preliminary Objection dated 28th October, 2024)

RULING

Background

1. This Ruling is in respect of the Appellant's Preliminary Objection dated 28th October, 2024. The Objection is against the Respondent's Notice of Motion application dated 17th October 2024 seeking to have funds deposited in a joint interest earning account pursuant to a consent order recorded in this Court on 23rd January, 2024, following the striking out of the appeal for want of jurisdiction released to him.
2. The Appellant's preliminary objection is premised on the following grounds that:
 - a. The Notice of Motion application dated 17th October 2024 is a non-starter as the Honourable Court lacks Jurisdiction to hear and determine this application since it has been filed in relation to a non-existent Appeal, the Appeal having been found devoid of Jurisdiction and struck out, thus dead on arrival and cannot be remedied.
 - b. The Honourable Court having Ruled on 9th May 2024 that it lacks Jurisdiction to hear and determine the Appeal, it cannot issue any Orders in relation to the Notice of Motion Application dated 17th October 2024, for without jurisdiction, the Court cannot entertain any proceedings.



- c. The Consent Order having been issued by a Court that lacked Jurisdiction to hear and determine the Appeal, was null and void ab initio and the funds deposited in the joint interest earning account, should be returned back to the Depositor, together with the interest therein, as any declaration by a court that has no Jurisdiction is itself a nullity and amounts to nothing.

Court's direction

3. The Court's directions were that the Preliminary Objection be canvassed by way of written submissions. Both Parties complied and filed their respective submissions which the Court has had occasion to read through. Parties highlighted their submissions on the 19th November, 2024.

Appellant/Objector's submissions

4. The Appellant submits that this Court having made a determination that it lacks the jurisdiction to hear and determine the appeal, it follows that any order by the Court lacking jurisdiction is null and void. The application by the Respondent has been filed in a non-existent appeal since the appeal was already struck out. Counsel cited the decision in Samuel Kamau Macharia & Another –vs- 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 to itself jurisdiction exceeding that which is conferred upon it by law.”

5. Counsel further cited the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989), where the Court of Appeal held that,

“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.”

6. The Appellant further submits that the consent having been adopted before a court without jurisdiction, and the appeal having been struck out, the appeal is non-existent. Therefore, all orders emanating from this appeal are null and void. Counsel cited the case of Monica Wangui Njenga - vs- Davis Kinyanjui Njenga & Another [2020] eKLR, where the Court ruled that it did not have Jurisdiction to hear the matter.
7. The Appellant therefore prays that the application by the Respondent is a non-starter and should be struck out with costs.

Respondent's submissions

8. On his part, the Respondent submits that the appeal having been struck out, the security ought to be released to the successful party. That the purpose of security is to ensure he gets to enjoy the fruits of the Judgement. Counsel for the Respondent cited the case of Arun C. Sharma –vs- Ashana Raukundalia t/a Rairundalia & Co. Advocates & 2 Others (2014) eKLR, where the Court stated:

“... The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the



Respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

9. Counsel for the Respondent submits that a debt was already due and owing. The Court adopted the order. It has the powers to order the release of the monies deposited. He argued that having been successful in this matter, the court has to exercise its discretion by allowing the application as prayed. He therefore prays for the dismissal of the Preliminary Objection.
10. In rebuttal, the Appellant’s Counsel argued that the Respondent had not addressed the issues raised in the Preliminary Objection. He submitted that the Appeal had not been heard and determined having been struck out for want of jurisdiction. Consequently, the consent order initially issued by the Court became null and void. Therefore, the funds ought to revert to the person who had deposited them.

Issues for Determination

11. I have considered the gist of the preliminary objection as well as the rival submissions thereon. The sole issue for determination is whether this Court has jurisdiction to hear and determine application by the Respondent.

Analysis and Determination

12. Jurisdiction is what gives courts and other adjudicatory bodies the mandate to determine disputes presented before them. Without jurisdiction, they labour in vain. The Supreme Court of Kenya underscored the centrality of jurisdiction in dispute resolution in the case of Samuel Kamau Macharia v Kenya Bank Ltd [2012] eKLR, in the following words:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court 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.”

13. Prior to the above pronouncement by the Supreme Court of Kenya, the Court of Appeal [Nyarangi JA] stated the following on jurisdiction in Owners of Motor Vessel Lillian “S” v Caltex Oil (Kenya) Limited (supra)

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the 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.”

14. The issue as to whether or not this court has jurisdiction to determine the Respondent’s application is therefore properly raised as a Preliminary Objection and the court will consider the same.
15. The appeal herein was struck out on the 9th May, 2024. Prior to that, parties had recorded consent on 23rd January, 2024 in the following terms:
 - a. The Appellant shall deposit the decretal amount of Kshs. 4,032, 095/= in a joint interest earning account in the names of the Advocates for the Appellant and Advocates for the Respondent within 21 days from today’s date.
 - b. There will be a stay of execution of the trial court’s judgement pending the hearing and determination of the appeal.



- c. In case of default, the Respondent will be at liberty to execute.
16. The Respondent's application dated 17th October 2024 seeks to have those funds deposited in a joint interest earning account pursuant to the above consent be released to him following the striking out of the appeal for want of jurisdiction.
17. It is important to note that once an order has been made declining jurisdiction, one cannot purport to take further proceedings, except for costs which were awarded at the time as provided for under Section 27 of the *Civil Procedure Act*.
18. The Respondent argues that the appeal having been struck out, he became the successful party hence the funds deposited in the joint interest account be released to him. That cannot be the case. A party is only successful if the main claim is heard and determined on merit in its favour. Without a judgment determining the merits or otherwise of the Appellant's claim herein, there is no successful party at the moment.
19. It follows therefore that having struck out the appeal for want of jurisdiction, the Court became functus officio in the instant appeal. Expounding on the principle of functus officio, the Supreme Court of Kenya in the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR rendered itself thus:
- “The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.
- According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. ...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”
20. The Respondent's application is inviting the court to make a determination in a non-existent appeal after it “downed its tools.” The application has no legal basis. In the case of Esther Tala Chebiegon -vs- Kiplagat Arap Biator [2005] eKLR, Justice Lucas Kimaru (as he then was) relied on the case of Nakuru HCCC No. 244 of 2004 Loice Wangari Njuguna & Two Others –vs- Afraha Educational Development Company Ltd & Another (unreported) and Nairobi HCCC No. 304 of 2004 Bunsun Travel Services Ltd & Anor versus Kenya Airways Ltd (unreported) where it was held that:
- “once a suit (or in this case an application) has been struck out, the court ceases to have jurisdiction to grant any orders subsequent thereto. The court becomes functus officio. If this court were to grant the order sought by the applicant, it would in effect be granting an order without any legal substratum. It would result in a travesty of justice.”
21. That is the fate of the Respondent's application. By the court downing its tools, it means that it ceased exercising any jurisdiction over the matter.
22. I agree with the Appellant's submission that the consent having been adopted before a court without jurisdiction, and the appeal having been struck out, all the orders earlier issued were rendered null and void.
23. The upshot of the foregoing is that the Preliminary Objection is merited; the Respondent's Notice of Motion Application dated 17th October 2024 is struck out with costs. The court makes no further orders having already downed its tools.



It is so ordered

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 21ST DAY OF JANUARY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Banda for the Appellant

Ms. Oketch for the Respondent

Court Assistant: Mpoye

