

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVI APPEAL NO. E135 OF 2024

MAULAN LIMITED.....APPELLANT

VERSUS

TIPMADHU SEASIDE CHALETS LIMITED.....RESPONDENT

**(Being an Appeal against the Judgment and decision of Honourable
NANCY MAKAU dated 26th November, 2024 in Malindi Magistrate’s
Court Case No E314 of 2022)**

RULING

1. This matter is coming up for a Ruling in respect of two pending issues raised in the Appeal;
 - (a) *The Respondent’s Notice Preliminary Objection dated 24/2/2026.*
 - (b) *The Appellant’s Application by way of a Notice of Motion dated 27/2/2026.*

Background Facts

2. The Appellant filed this Appeal before this Court. The matter was heard on an application for a stay of execution and interlocutory orders of stay granted.
3. Thereafter, the matter was identified for the **Rapid Results Initiative (RRI)** for the month of March, 2026 at the Malindi High Court. Parties were directed to file the Record of Appeal and this was done. Parties also filed their respective submissions in support or opposition to the Appeal.

4. Before the Appeal could be heard, the Respondent raised a Notice of Preliminary Objection dated 24/2/2026. It set out the following grounds;
- 1. *The Honourable Court lacks jurisdiction to hear and determine the appeal as filed.***
 - 2. *The appeal as filed violates the provisions of Section 2 and 30 (7) of Sectional Properties Act No. 21 of 2020.***
5. In response and in what now appears to be a concession to the Preliminary Objection raised, the Appellant filed an application dated 27/2/2026. In it, it sought the following prayers;
- a) *Spent.***
 - b) *That Civil Appeal Number E135 of 2024 be transferred to the Environment & Land Court for hearing and determination.***
 - c) *That the directions that were given on admission apply to the said court file within the Environment & Land Court Division.***
 - d) *That costs be in the cause.***
6. The Court taking note that what was raised was a jurisdictional issue, directed the parties to submit in respect of their two rival positions and prayers.

Issues for Determination

7. To this Court, there are only two issues for determination.
- a) *Whether the Appeal ought to have been filed before the Environment and Land Court.***
 - b) *Whether the Court had power to transfer this Appeal to the Environment and Land Court.***

8. The leading authority on raising of Preliminary Objections remains the case of **Mukisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors Ltd [1969] EA 696**. The Court of Appeal said the following;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the other facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. When it comes to transfer of suits, the Court is empowered to do so under **Section 18 (1) of the Civil Procedure Act** which states as follows;

18. Power of High Court to withdraw and transfer case instituted in subordinate court

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for

trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(a) Whether the Appeal ought to have been filed before the Environment and Land Court.

10. The Court was referred to **Section 30 (7) of the Sectional Properties Act** which states as follows;

30. Enforcement of by-laws

(1) If an owner contravenes any of the by-laws, a corporation or an aggrieved owner may refer the dispute to the Committee provided for under section 20 and 30.

(2) A corporation or an aggrieved owner shall, when referring a dispute to the Committee under subsection (1), specify the by-laws that were contravened by the owner.

(3) On hearing a dispute referred to it in accordance with subsection (1), the Committee shall determine the dispute and make a finding and order which shall be in writing and signed by the members of the Committee.

(4) A Corporation shall not commence an action under this section unless it is authorized by the by-laws to do so.

(5) Referral of a dispute to a Committee under this section shall not restrict or derogate the referee from a remedy that an owner or the corporation may have against the disputing person.

(6) In the event of non-compliance with an order of a Committee the aggrieved party may apply to the Court to enforce the order of the Committee.

(7) If a party is dissatisfied with the determination of a Committee under this section, the party may appeal to the Court.

11. As per **Section 2 of the said Act** the definition of the Court is as follows;

"Court" means the Environment and Land Court established under the Environment and Land Court Act (Cap. 8D);

12. It needs not belabouring that once confronted with this Section, the Appellant saw the light of day. That this Appeal ought to have been filed before the Environment and Land Court. It therefore sought for the transfer of the Appeal to the Environment and Land Court.

13. It is before the wrong forum and this Court lacks jurisdiction to hear it.

14. That would have been the end of the matter and the Court downed its tools and declined to hear the Appeal. However, we have been asked to transfer the suit to the correct Court of equal status.

(b) Whether the Court had power to transfer this Appeal to the Environment and Land Court.

15. The Appellant/Applicant implores this Court to exercise its inherent jurisdiction. It also refers to that jurisdiction as a residual jurisdiction to transfer the suit.
16. It pleads that it made a procedural error in filing the suit before the High Court. It urges the Court to deal with the error administratively. This leans more to correcting than to striking out the Appeal
17. It refers the Court to the decision in **Kaunda v Wambua [2025] KEELC 802 (KLR)**. This is a decision of my **Sister Lady Justice Matheka** when in declining to strike out suit filed in the wrong Court, stated as follows;

“In conclusion the High Court and Courts of equal status have inherent jurisdiction, is means that, this court, exercising such jurisdiction can transfer the matter. I find this preliminary objection is not merited and I dismiss it with no order as to costs. Consequently, I order that this matter be transferred to the High Court Machakos for hearing and determination.”

18. The Court is also referred to **Section 3A of the Civil Procedure Act** which states as follows;

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

19. **Miss Ruttoh** Counsel for the Respondent urged this Court to find that it lacked any power to transfer the Appeal once it found that it was filed in a Court that lacked jurisdiction. She referred the Court to the decision in the *locus classicus* case of **The Owners of the Motor Vessel “Lillian S” v**

Caltex Oil (Kenya) Ltd. [1989] KECA 48 (KLR) where Nyarangi J.A stated: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. This Court refers to the decision of the Court of Appeal in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] KECA 767 (KLR)**.

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction.”

21. On that account, this Court is fully aware that bending to the rules of precedent, it lacks the jurisdiction to transfer this Appeal pursuant to **Section 18 of the Civil Procedure Act**.

22. What of the inherent jurisdiction of this Court? What has been described as the residual jurisdiction by **Mr. Tindi**? This is the power that exists within

the hallowed corridors of justice, for a Court to do what is good and just at all times. To avoid causing hardship, illegalities and injustice. It is the power that exists independent of any statute for the Court to act and issue orders that feel good and go towards achieving the ends of justice. In modern parlance it is what would be described as the Court's secret super power.

23. In **Kaunda v Wambua [2025] KEELC 802 (KLR)** the Court described this residual power or jurisdiction in the following terms;

“The issue before me is whether or not the court has jurisdiction to transfer the suit from one High Court to another High Court. In my view and finding, this Court has inherent residual jurisdiction to put right that which would otherwise be or amount to injustice within the meaning or power donated by Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya.

In the matter of the Estate of George M'Mboroki, Meru HCSC No. 357 of 2004 the court stated that;

“... the court retain certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent abuse of process to do justice between the parties”.

I find that the court should act in a manner or with the view of accomplishing a fair and proper administration of the law which would also mean or be in the interest of justice. From the court record it would appear that the court suo moto transferred the matter to the

Environment and Land Court despite it having originally been filed in the High Court. In the case of Rev. Madara Evans Okanga vs Housing Finance Company of Kenya, HCCC No. 262 of 2005 the court held that;

“..... the jurisdiction of the Court which is comprised within the term “inherent”, is that which enables it to fulfill itself properly and effectively, as a court of law... in sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just and equitable to do so, in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and secure a fair trial between them.”

The court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the court to act to prevent abuse of court process by a party so that fairness is maintained between the parties. The relevant question that arises is whether such inherent or residual power of this court can authorize the court to transfer this case to the High Court which has jurisdiction?

In the case of Prof Daniel Mugendi vs Kenyatta University & Others, Civil Appeals No. 6 of 2012 the Court of Appeals stated that;

“... In order to do justice in the event where the High Court, the Industrial Court or the Environmental Land Court Division comes 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 similar and equal status should in the spirit of harmonization effect the necessary transfers among themselves...”

*Indeed, this inherent power has often been exercised by the High Court which transferred cases from one High Court to another High Court. In *Rapid Kate Services Ltd vs Freight Forwarders Kenya Limited & 2 others* (2005) IKLR 292 Emukule, J stated that;*

“..... the court’s power to transfer proceedings from one court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the Plaintiff had initially chosen, should be dealt with or heard or determined by the court most appropriate and suitable for those proceedings. When making or refusing an order for transfer the court will have regard to the nature and character of the proceedings and, the nature of the relief or remedy sought, the interest of the litigants and most important, the administration of justice.... It is a matter of discretion for the judge and it must be for compelling reasons which would be for the purpose of ensuring justice and this is all within the inherent powers of court under Section 3A... whereas there is no express provision in the Civil Procedure... for the transfer of cases from one High Court to another, it does not

mean that in a proper case the court cannot transfer a case before it to another registry of the High Court”

24. The Court strongly feels that the Judiciary that exists post 2010 Constitution, is a very progressive Judiciary. It has broken itself free from any shackles that held it in the past. It speaks loudly to efficiencies, especially those that provide quick resolution of disputes. It fully embraces the Oxygen principle set out in **Section 1A and 1B of the Civil Procedure Act**.

25. **Article 159 of the Constitution** directs the Courts to administer justice with due regard to technicalities, as follows; (*underlined emphasis ours*),

159. Judicial authority

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

26. In this case, the Appellant states that the suit was filed within the very same Judiciary that is supposed to hear and determine the Appeal. Due to a procedural error/defect, it was filed before the High Court instead of the Environment and Land Court.
27. **Mr. Tindi** Counsel for the Appellant persuades this Court and strongly so, that it has the power to right or cure this procedural defect. This is by sending the Appeal before the right Court. This is still within the very same Judiciary of the Republic of Kenya. To this Court when a visitor misses the correct house and knocks at the wrong door, we do not bring out the guillotine and chop off his head. We point him to the correct house. At times we even send him with a child of the home to ensure he is delivered safely to the correct door. In the same manner, this Court should not be seen to chase away litigants who by ill luck knock at the wrong doors of the Court. The Court should be seen as facilitative, always ready to point the litigants to the correct door(s) that lead to the various halls of the Temple of Justice. That is the essence of promoting access to justice s per **Article 48 of the Constitution**.
28. Even as the Court applies its mind to the Predominant purpose test in checking whether it can assume jurisdiction in a matter that straddles this Court or the Courts of Equal Status, it should not be lost that it has a constitutional duty to facilitate access to justice.
29. It is not lost to this Court that in view of the latest technological inventions and adaptations, the transfer of suits is now a quick administrative function that is undertaken via a click of a button or a mouse. Gone are the days when the Appellant would have had to present bulky documents for filing a fresh before the Court where the file is transferred to. The Judiciary works seeks seamlessly, online and as the arm of Government that is at the forefront of embracing digitization. A Judiciary that is always online, whose portals never

close. A Judiciary that never goes to sleep as its back offices and online servers are always humming with activities. This picture paints a radically different image from the Judiciary that existed before the digital era. A Judiciary that worked to the rhythm of daylight hours and relied heavily upon the power of the pen and paper.

30. A transfer of the Appeal sits well with this Court as it will allow the parties to ventilate their disputes before the court of equal status. The Appeal will be determined on merits. The Court shudders to think of the judicial man and woman hours that would be spent, to bring this Appeal back online were it to be struck out at this point, based on the arguments presented by the Respondent.
31. Having said so, the Court holds that the powers being exercised herein are merely administrative, to cure or correct a procedural lapse. A right of appeal existed and was taken by the Appellant, but it has to be exercised before the correct Court.
32. This Court has considered the decision in **Ganjoni Properties Limited & 11 others v Al-Riaz International Limited; F. Kinyua Kamundi & Muyaa D. T t/a Kinyua Muyaa & Co. Advocates & 11 others (Affected Party) [2025] KECA 1711 (KLR)**. The Court of Appeal has shown the way. It found that the High Court lacked jurisdiction in a dispute and remitted the dispute to the Environment and Land Court.

“On the authority of D. Njogu & Company Advocates v National Bank of Kenya Limited (ibid), the High Court could not arrogate to itself the jurisdiction to entertain the respondent’s suit on the basis of an agreement made in contravention of statute law. Having held that the High Court had no jurisdiction to entertain the respondent’s suit, and having considered the provisions of sections 2 and 12 of the Act, we

reach the inescapable conclusion that the learned Judge had no jurisdiction or power to entertain the respondent's suit or issue any orders therein.

By reason of the matters aforesaid, we find that the 1st to 11th and the 12th appellants' appeals succeed and are hereby allowed. Consequently, we hereby order and direct as follows:

- “a. The ruling and orders of the High Court (Njoki Mwangi, J.) dated 15 th July 2022 made in Mombasa HCCC No. 158 of 2014 be and are hereby set aside,*
- b. The suit in Mombasa HCCC No. 158 of 2014 be and is hereby remitted to the Environment and Land Court at Mombasa for hearing and determination on a priority basis.*
- c. The entire file and record in Mombasa HCCC No. 158 of 2014 shall be placed before the Presiding Judge of the Environment and Land Court at Mombasa, and mentioned within 45 days of the date of this judgment for the necessary directions to facilitate its expeditious hearing and determination.;*
- d. The Deputy Registrar of this Court shall take immediate steps to ensure transmission of this judgment together with the orders hereby made to the Presiding Judge of the High Court at Mombasa and the Presiding Judge of the Environment and Land Court at Mombasa to facilitate the expeditious transfer and hearing of Mombasa HCCC No. 158 of 2014.*
- e. The parties in the consolidated appeals herein shall bear their own costs of the appeals.”*

- 33.If the Court of Appeal in its wisdom was of the view that once a suit is filed in the wrong forum, it is a nullity, it would not have acted as it did in the **Ganjoni Rent case** above. The Court has not come across an express statute bar that prohibits the Court from exercising this power of transfer. The effect is that it frees up the business of the Court to expedite dispute resolution, while at the same time doing justice.
34. To this Court, the procedure adopted in the **Ganjoni Rent case** embraces this new and lived reality of the High Court and Courts of Equal Status acting as Courts within the very same Judiciary and not different institutions. The Courts of equal status are specialized Courts, administering the same justice and not from different territories. They are all Courts of the same Judiciary of the Republic of Kenya, serving the same Kenyans.
- 35.The Court finds favour in the procedure adopted by **Hon Lady Justice Matheka** in **Kaunda v Wambua [2025] KEELC 802 (KLR)**. It is also bound by the precedent laid down by the Court of Appeal in the **Ganjoni Rent case** cited above.
- 36.The Notice of Preliminary Objection is well taken, but rather than strike out the suit, the same is transferred to the Environment and Land Court for hearing and disposal.
- 37.As to costs, each party will bear its own costs of the Notice of Preliminary Objection as well as the Application for transfer of the suit. The order is fair and recognizes that neither party has won or lost in this Appeal. It is still yet to be heard and determined.

Determination

38. The Court proceeds to determine the matter as follows;

- a) *This Appel is administratively transferred to the Environment and Land Court for hearing and disposal.*
- b) *The Deputy Registrar of this Court to facilitate the transfer of the file to the Environment and Land Court.*
- c) *Each Party to bear its own costs.*
- d) *The file is marked as closed at the High Court in Malindi Civil Division Registry.*

39.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF
MARCH, 2026**

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Mr. Tindi for the Appellant/Applicant

Miss Ruttoh for the Respondent.

Mr. Mohamed – Court Assistant.