



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 2 OF 2017(JR)**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF SECTION 4, 5, & 6 OF THE FAIR ADMINISTRATIVE**

**ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF SECTION 24 OF THE PHYSICAL PLANNING ACT**

**AND**

**IN THE MATTER OF ARTICLES 47 AND 62(2) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF PROHIBITION, MANDAMUS AND CERTIORARI**

**BETWEEN**

**CORDISONS INTERNATIONAL (K) LIMITED.....APPLICANT**

**VERSUS**

**CHAIRMAN, NATIONAL LAND COMMISSION....1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PHYSICAL PLANNING, MINISTRY OF LANDS AND**

**PHYSICAL PLANNING.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF LAMU.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. I have before me two Preliminary Objections for determination. The First Objection is dated 15<sup>th</sup> March 2017 and was filed in court on 16<sup>th</sup> March 2017 by Messrs Kenwind Holdings Limited described herein as the Interested Party. The Second Objection also filed herein on 16<sup>th</sup> March 2017 is by another group of 39 individuals also describing themselves as Interested/Afflicted Parties.

2. The facts precipitating these objections are pertinent to the decision thereon. On or about 19<sup>th</sup> January 2017 the Applicant, Cordisons International (K) Limited moved to the High Court at Nairobi and filed Miscellaneous Application No. 15 of 2017 seeking leave to apply for Judicial Review Orders of :-

*a. Certiorari to remove into (the) court and quash the Part Development Plan No. NRB/128/2016/01 dated 26<sup>th</sup> July 2016 and published in Gazette Notice Number 6454 on 12<sup>th</sup> August 2016 by A.K. Masinde for Director of Physical Planning.*

*b. Certiorari to remove into (the) court and quash the purported Part Development Plan dated 30<sup>th</sup> August 2016 and published in Gazette Notice number 7851 on 30<sup>th</sup> September 2016 by V.O. Osewe for Director of Physical Planning amending Part Development Plan No. LMU/1281/01/16.*

*c. Mandamus compelling the National Land Commission to forthwith issue land lease instruments as directed by the County Government of Lamu in its letter Reference LCG/PA/Vol. 2/2014/77 dated 5<sup>th</sup> December 2014 for the area over the approximately 11,100 acres or thereabouts situate in Kiongwe within Lamu County and covered under the coordinates as outlined in the Award of 2<sup>nd</sup> September 2013 by the County Government of Lamu in the Letter of Award for Land Lease Reference No. LCG/ADM/3/3/77/2013/18 and captured in the Valuation Report of 21<sup>st</sup> March 2014 by Saad Yahya & Associates.*

*d. Certiorari to remove into (the) court and quash the direction sent by the Chairman, National Land Commission to the 3<sup>rd</sup> Respondent on 11<sup>th</sup> October 2016 through letter Reference Number NLC/CHAIRMAN/Vol. XVIII/30 for the approval of the amended Part Development Plan of 30<sup>th</sup> September 2016 but excluding the Applicant's interest.*

*e. Prohibition to be directed at the Chairman, National Land Commission, whether by himself or through his agents and/or servants, from denying and/or compromising the validity of the Applicant's approval with regard to the allocation and implementation of the Applicant's project over the approximately 11,100 acres or thereabouts situate in Kiongwe within Lamu County and covered under the coordinates as outlined in the Award of 2<sup>nd</sup> September 2013 by the County Government of Lamu.*

3. The said application dated 18<sup>th</sup> January 2017 is supported by a lengthy 67 page Verifying Affidavit detailing various grounds of alleged bias, breaches of Rules of natural justice, ultra vires acts and manifest unreasonableness on the part of 5 the Respondents herein.

4. On 20<sup>th</sup> January 2017, the file was placed before the High Court Duty Judge the Honourable Justice Roselyn Aburili who certified the same as urgent and directed the Applicant to serve the Respondents forthwith for inter-partes consideration on 30<sup>th</sup> January 2017.

5. On 27<sup>th</sup> January 2017, prior to the date set for the inter-partes hearing, the Honourable the Attorney General sued herein as the 5<sup>th</sup> Respondent filed a Notice of Preliminary Objection on one ground stated

as follows:-

*1. This Honourable Court lacks the jurisdiction to hear and determine the present application by virtue of the provisions of Article 165(5) of the Constitution which states that*

*a. "The High Court shall not have jurisdiction in respect to matters (b) falling within the jurisdiction of the courts contemplated in Article 162(2).*

6. On 30<sup>th</sup> January 2017 when the parties appeared before the Hon. Justice Aburili for the hearing *inter-partes*, a number of Respondents were yet to file their responses to the application and sought to be granted time to do so. Having heard various representations on the matter including the fact that there was a related matter being Petition No. 18 of 2016 pending before the Malindi Environment and Land Court, the Learned Judge directed that the matter be placed before the ELC at Malindi for further directions and consideration. The file was accordingly transferred to this court with a mention date for 15<sup>th</sup> February 2017.

7. On 15<sup>th</sup> February 2017, when the matter came up for mention before this court, Ms Kenwind Holdings Ltd which is mentioned a couple of times in the Verifying Affidavit applied to be enjoined in the proceedings and was enjoined accordingly as a necessary Interested Party with the consent of the Applicant. Having been so enjoined, on 16<sup>th</sup> March 2017, Ms Kenwind Holdings Limited filed the First Preliminary Objection objecting to the proceedings herein on the following grounds:-

*1. The court lacks jurisdiction to entertain an incompetent suit transferred by a court without jurisdiction.*

*2. The proceedings having been commenced in the High Court on matters touching on land planning and ownership is a nullity notwithstanding the transfer and ought to be dismissed with costs as jurisdiction is everything (and) without it a court has no power to make one step (sic).*

*3. The proceedings violate Article 162(2) and 165 of the Constitution of Kenya.*

*4. The proceedings challenge the merits of the decisions made which can only be done in an ordinary suit.*

*5. The whole proceedings (sic) are incompetent, invalid, and null and void (and) ought to be dismissed.*

8. On the same day, the 39 individuals styling themselves as Interested//Afflicted Parties through their Appointed Advocate filed the Second Preliminary Objection herein stating as follows:

*a. The gist and substance of the ex-parte applicant's motion does not render itself and/or amendable(sic) to judicial review jurisdiction because it relates to complex and vested interests in land which are not within the purport and armpit(sic) of judicial review jurisdiction but rather determinable through an ordinary action.*

*Reasons wherefore the Interested Parties herein pray that the ex-parte Applicant's application filed before this court be struck out and/or dismissed at a preliminary level with costs to the interested parties.*

9. The two Preliminary Objections were argued simultaneously before me on 29<sup>th</sup> May 2017 and Mr. Mogaka, the Learned Counsel for the 1<sup>st</sup> Interested Party (Kenwind Holdings Ltd) urged the court to find that the High Court had no jurisdiction to transfer a matter filed in a court lacking jurisdiction to one having jurisdiction. Counsel submitted that this case relates to physical planning, use and ownership of land and that since the same was filed in the High Court, the same were a nullity and could not therefore be transferred to another court or dealt with in whichever way. Referring the Court to a number of

authorities, counsel urged the court to dismiss the proceedings and not to grant any other orders thereto. His position was supported by Mr. Kilonzo Learned Counsel for the 39 Interested/Afflicted Parties. In addition Mr. Kilonzo contended that arising from the decision of the Supreme Court in Petition No. 5 of 2015, **Republic –vs- Karissa Chengo & 2 Others**, the ELC Court being a specialized court had no jurisdiction to deal with Judicial Review matters as such jurisdiction was only conferred under Section 8 of the Law Reform Act to the High Court. He urged the Court to strike out the application.

10. The Submissions by the Interested Parties were further supported by Mr. Wahome Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Ms Angela Munyuny, Learned Counsel for the 5<sup>th</sup> Respondent. In addition, Ms Munyuny urged the court to look at the 5th Respondents Notice of Preliminary Objection filed on 26/1/2017 before the matter was transferred from Nairobi to find that the High Court had no jurisdiction and that consequently there was nothing that could have been transferred.

11. In response to the two Preliminary Objections, Mr. A. Wasunna, Learned Counsel for the Exparte Applicant urged the Court to disregard the submissions made by the counsel for the 5<sup>th</sup> Respondent on the basis that the same had been considered by Aburili J. and were now spent as they were partly the reason the orders transferring the file to Malindi were made.

12. Mr. Wasunna further submitted that the 39 Interested/Afflicted Parties were not a proper party in view of Order 53 Rule 6 of the Civil Procedure Rules. Learned Counsel submitted that an affected party who comes into Judicial Review proceedings without being joined can only do so at the substantive stage. Having come into these proceedings at the leave stage, they were not proper parties and should not therefore be heard at this stage.

13. On the question of whether this court is seized with the jurisdiction to hear this matter, Counsel submitted that this court and the JR Division of the High Court have equal status and none can sit on an appeal on the decision of the other. It was his submission that since the issue had been dealt with by the Honourable Aburili J., the matter was now res judicata and this court functus officio. Any party affected by the orders of Aburili J. can only now move to the Court of Appeal but not purport to seek a review thereof in this court.

14. I have considered the arguments for and against the Preliminary Objections before me. I have also considered the submissions and the useful authorities placed before me by the Learned Counsels representing the parties herein. Arising from the pleadings filed and the submissions made, three broad issues stand out for my determination. They may be framed as follows:-

- 1. Whether or not the 39 Interested/Afflicted Parties are a proper party deserving audience at this stage of the proceeding;*
- 2. Whether this court has jurisdiction to entertain this suit which was first commenced before the High Court; and*
- 3. Whether the issues raised herein are amenable to determination by way of Judicial Review and if so whether this court has jurisdiction to deal with matters concerning the specialized jurisdiction of judicial review.*

15. I will accordingly proceed to look at the issues as framed hereinabove one by one.

**1. Whether or not the 39 Interested/Afflicted Parties are a proper Party deserving audience at this stage**

As I have pointed out, upon transfer of this matter from the Judicial Review Division of the High Court in Nairobi, it came for mention on 15<sup>th</sup> February 2017 when Messrs Kenwind Holdings Ltd was enjoined in the proceedings with the consent of the Applicant. On 16<sup>th</sup> March 2017 Messrs Kilonzo & Aziz Advocates filed a Notice of Appointment of an Advocate herein stating in part as follows:

*TAKE NOTICE that the INTERESTED/AFFLICTED Parties herein LINUS GACHOKI GITHI & Others have today appointed the firm of Kilonzo & Aziz Co Advocates to act for them and represent them in this matter.*

16. Filed simultaneously with the said Notice is a document titled “Authority to act on behalf of Another” showing that pursuant to Order 1 Rule 13 of the Civil Procedure Rules, the parties named therein had authorized Linus Gachoki Githi, Evelyne Wakunywa Mwakisha and Isaac Roba Alakhe to proceed and prosecute this case for and on their behalf and to sign all necessary court documents on their behalf. The other document filed on the said day is the Second Preliminary Objection to which I have already referred.

17. It was the Afflicted Parties submissions that the High Court had ordered the Applicant to serve all the Interested Parties but the Applicant had deliberately omitted to join them to the proceedings even though the Applicant is aware of their interest in the matter. Ordinarily, an application for leave to apply for Judicial Review orders are under Order 53 Rule 2 of the Civil Procedure Rules made ex-parte provided that, as happened in this case, where the circumstances require, the Judge may direct that the application be served for hearing inter-partes before the grant of leave.

18. Upon leave being granted, Order 53 Rule 3(2) and (4) of the Civil Procedure Rules provides as follows:-

*2. The Notice (of motion) shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.*

*4. If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms(if any) as the court may direct.*

19. Thus whereas sub rule (2) of Order 53 rule 3 aforesaid restricts persons who should be served to those who are ‘directly affected’ sub-rule 4 on the other hand gives the court wide discretion at the substantive motion stage to order that the application be served on any other person notwithstanding that that person ought to have been served under sub-rule (2) or not and the court’s decision to do so is only subject to “such terms (if any) as the court may direct.” Accordingly in my view, where the court is of the view that a person ought to be joined to the proceedings the court is entitled to direct that that person be joined even where that person has not made an application to court.

20. However, I think where a party on his own wants to be enjoined in such proceedings, it is incumbent upon such a person who alleges that he or she ought to have been served to show how the proceedings affect him or her. The court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.

21. In this regard, I associate myself with the decision in ***Macadamia Nuts Dealers –vs- Horticultural Crops Development Authority & Others (2014) eKLR*** where the court stated that:-

*“an interested party is a party who has a stake/interest directly in the matter before the court, though he or she is not a party to the case. He must be a party who is likely or who will be affected by the decision of the court and he or she is of the view that unless he is enjoined in the matter his or her interest will not be well articulated or protected unless she or he is made a party to ventilate his or her cause.”*

22. In the case before me, the 39 (or are they 41 as per the Notice of Appointment of Advocate?)

individuals have simply walked into these proceedings without indicating how the orders sought by the Applicant are likely to affect them. As at present therefore, this court is not possessed of sufficient material on the basis of which the court can determine that they have interests in this suit which ought to be canvassed at this stage of the proceedings.

23. In the premises I find and hold that the 39 individuals are not proper parties to the proceedings at this stage and are thus not entitled to audience in regard to these present proceedings.

**2. Whether this court has jurisdiction to entertain this suit, the same having been filed and commenced before the High Court.**

24. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lilian S” – vs- Caltex Oil(Kenya) Ltd (1989) KLR 1 where Justice Nyarangi of the Court of Appeal states that:-

*“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 draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

25. It has been said that the authority for this holding by the then Learned Judge of Appeal is to be found in the writings of John Beecroft Saunders in a treatise headed Words and Phrase Legally defined- Volume 3:I-N where the Learned Author states at Page 113 the following about jurisdiction:-

*“By jurisdiction is meant the authority which the court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restrictions or limits is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. 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.”*

26. It is not contested that the present proceedings were initially instituted in the Judicial Review Division of the High Court at Nairobi being Miscellaneous Application No. 15 of 2017 on 19<sup>th</sup> January 2017. Before the matter came up for hearing inter-partes, the 5<sup>th</sup> Respondent filed a Preliminary Objection contending that the said court had no jurisdiction. On 30<sup>th</sup> January 2017, the Honourable Justice Roselyn Aburili transferred the matter to this court for hearing and disposal. The Interested Parties herein however contend that notwithstanding the transfer, the proceedings remain a nullity and that this court lacks jurisdiction to entertain an incompetent suit which was transferred to it by a court without jurisdiction.

27. Before I delve into the issue of whether this court has jurisdiction to entertain these proceedings, I must however first turn my attention to the issue of whether or not that question is res judicata as stated by the Applicants. It was Mr. Wasunna’s Submissions for the Applicant that the issues being raised herein had already been determined conclusively by the Honourable Aburili J., when the Learned Judge transferred this suit to Malindi and this court being of equal status cannot sit on appeal and/or be asked to review the decision made by a judge of equal status.

28. I have looked at the proceedings that took place and the Ruling of the Learned Judge on 30<sup>th</sup> January

2017. The doctrine of res judicata is anchored in Section 7 of the Civil Procedure Act in these terms:-

**“7. Res judicata**

*No court shall try any suit or issue in which the matter 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.”*

29. From the foregoing, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be by the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly, that the court or tribunal before which the former suit was litigated was competent and determined the suit or issue finally (see **Karia & Another –vs- The Attorney General and Others (2005) 1 EA 83.**

30. Simply put res judicata is essentially a bar to subsequent proceedings involving the issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. **Halbury’s Laws** (4<sup>th</sup> Edition, Vol. 16 Paragraph 1527 -1529) states that in deciding what questions of law and fact were determined in the earlier Judgment, the court is entitled to look at the Judge’s reasons for his decision, and his notes of the evidence and is not restricted to the record.

31. It is not in dispute that the interested party herein was not part of the proceedings in the High Court in Nairobi. Be that as it may, it is important to look at the record of the proceedings before the Honourable Aburili J. on 30<sup>th</sup> January 2017 in order to determine if the Learned Judge made a final and conclusive determination of the issues herein. From the handwritten record of the proceedings, the Learned Judge after recording the coram succinctly put down what every party said as follows:-

**“Mr. Wasunna (For Applicant)**

*We served all parties as directed by the court. The 5<sup>th</sup> Respondent has served us with Notice of Preliminary Objection. No other respondent has served us with any response.*

**Mr. Wahome (for 1<sup>st</sup> and 2<sup>nd</sup> Respondent)**

*We were instructed on 26/1/2017. Clients were served on 17/1/2017. We seek time to respond to the Chamber Summons.*

**Mr. Otieno (holding brief for Ms Swaleh for 4<sup>th</sup> Respondent)**

*Miss Swaleh filed MOA. The Country Director Lamu was not in office to swear an affidavit. We seek for 14 days to file a Replying Affidavit.*

**Miss Maina (holding brief for Bitta for 3<sup>rd</sup> and 5<sup>th</sup> Respondents)**

*We filed Notice of Preliminary Objection. We pray that it be dispensed with first.*

**Mr. Wahome (for 1<sup>st</sup> and 2<sup>nd</sup> Respondents)**

*There is also Petition No. 18/2016 in Malindi ELC- Omar Abdalla Mohammed & 20 Others –vs- County Government of Lamu & Others which is scheduled for hearing on 2/2/2017 hence we seek for directions that this matter be transferred to Malindi for directions.*

**Mr. Wasunna (for the Applicant)**

*We have no problem sending this matter to ELC. However, the Malindi Case is different from this case. The Malindi Case is due on 15/2/2017.”*

32. Having heard the parties as such, the Judge made a brief Ruling as follows

***RULING***

*This matter was filed under Certificate of Urgency on 20/1/17 and the court did certify it as urgent and directed the Applicant to serve the Respondents for inter-partes hearing today.*

*All parties are present. Upon consideration of the Chamber Summons and the accompanying Statutory Statement, Verifying Affidavit and annexures thereto, I am persuaded that this matter can best be heard and determined before the Environment and Land Court (ELC)*

*And as there is concession that there is Petition No. 8/2016 before Malindi ELC wherein the subject matter is similar to this case, I hereby direct that this matter be and is hereby placed before the Environment and Land Court at Malindi for further directions and consideration on 15/2/17.*

*The Deputy Registrar to expeditiously dispatch this file to Malindi ELC for mention on 15/2/2017. I decline to make any conservatory orders as parties can seek for such orders before ELC Malindi.*

*Orders Accordingly.”*

33. Arising from the foregoing, I am not convinced that the Learned Judge finally and conclusively dealt with the Notice of Preliminary Objection as raised by the Honourable Attorney General and Miss Munyonyi is therefore correct in my view, to ask this court to consider the said objection as filed on 27<sup>th</sup> January 2017. Indeed, even in the event that my findings on the objection is erroneous, it is certain that the issue of whether or not this court has jurisdiction to entertain a suit which was first commenced in a court which is said to lack jurisdiction was never raised before and was therefore not considered, by the Learned Judge. As it were the Learned Judge simply forwarded the file to Malindi for further directions and consideration and did not delve into the substantive issues raised by the parties.

34. Accordingly, it is my finding that the Honorable Aburili J did not finally and conclusively deal with the question of jurisdiction as raised herein and the objection that the matter is res judicata fails. Similarly, the contention that this court is being asked to review the decision of the Honorable Aburili J and/or that this court is being asked to sit on Appeal on her decision is erroneous and is, in the same breadth, rejected.

**Whether this court has jurisdiction to entertain this suit**

35. In their Notice of Preliminary Objection dated 26<sup>th</sup> January 2017 and filed herein on 27<sup>th</sup> January 2017, the 5<sup>th</sup> Respondent contends that the High Court in which this suit was first filed lacked jurisdiction to hear and determine the application by virtue of the provisions of Article 163 of the Constitution which states that:-

*“the High Court shall not have jurisdiction in respect to matters... falling within the jurisdiction of the Court contemplated in Article 162(2).*

36. On their part and having come in after the transfer of the suit, the Interested Party submits that this court lacks jurisdiction to entertain an incompetent suit transferred by a court without jurisdiction. It is their case that the proceedings herein touch on land planning and ownership and that the commencement thereof at the High Court was in violation of Articles 162 (2) (b) and 165 of the Constitution and the same ought to be dismissed for want of jurisdiction. As I understood it, this position is supported by the Chairman National Land Commission, the National Land Commission and the Director of Physical Planning in the Ministry of Lands and Physical Planning all sued herein as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>

Respondents.

37. On the other hand, the County Government of Lamu sued as the 4<sup>th</sup> Respondent herein supports the Applicant's position that in as much as the matter was filed in the High Court, the same is now properly before this Court and should be determined without any further delay.

38. I think it is imperative that when an issue is raised as to whether or not a court has jurisdiction to deal with a particular matter before it, it is crucial that we be clear about what is meant by "jurisdiction." Luckily, there is no need to invent the wheel as a number of treatises and judicial pronouncements have been useful in clarifying the meaning thereof.

39. In **Guaranty Trust Co. of New York –vs- Hannay & Co (1915) 2 KB 536** at 563, Pickford LJ opted to reject the nuance between the word "jurisdiction" and the expression "the court has no jurisdiction" to help achieve a meaning when he stated:-

*"The word "Jurisdiction" and the expression "the court has no jurisdiction" are used in two different senses which I think often leads to confusion. The first and in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, that is, that, although the court has power to decide the questions it will not according to its settled practice do so except in a certain way and under certain circumstances."*

40. These statements were duly approved a half century later by Diplock LJ(as he then was) in **Garthwaite –vs- Garthwaite (1964) 2 All ER 233, 244** when he affirmed Pickford LJ's position and continued thus:-

*"In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its "jurisdiction" (in the strict sense), or as to circumstances in which it will grant a particular kind of relief which it has jurisdiction – (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances."*

41. In **Karisa Chengo & 2 Others –vs- Republic (Criminal Appeal No.s 44, 45 and 76 of 2014 (2015) EKLK**, the Court of Appeal had this to say on the question of jurisdiction:-

*"However, before that, we should reiterate that jurisdiction is a fundamental principle in the dispensation of justice. The Supreme Court in the recent decision of Re the Matter of Interim Independent Electoral Commission stated that:-*

*"Assumption of jurisdiction by the courts is a subject regulated by the Constitution, by statute law and by principles laid down in judicial precedent. The classical decision in this regard is the Owners of Motor Vessel "Lilian S" –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1, which bears the following passage (Nyarangi J.A. at Paragraph 14):*

*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. (30) The Lilian 'S' Case establishes that jurisdiction flows from the law, and the recipient-court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity. In the case of the Supreme Court, their respective jurisdictions*

*are donated by the Constitution.”*

42. As I have pointed out, the Applicant does not dispute the fact that the suit herein relates to matters of land planning and ownership. It is however its case that where the court is of the view that it has no jurisdiction, it can down its tools but transfer the matter to another court which is competent to hear it. Article 162 of the Constitution provides as follows:-

*1. “162 The Superior Courts are the Supreme Court, the High Court and the Courts mentioned in clause (2).*

*2. Parliament shall establish courts with the Status of the High Court to hear and determine disputes relating to*

*(a) Employment and labour relations; and*

*(b) The Environment and the use and occupation of, and title to land*

*3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause(2)*

*4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

43. On the other hand, Article 165 of the Constitution provides as follows:-

*“165. (1) There is established the High Court which*

*a. Shall consist of the number of Judges prescribed by an Act of Parliament; and*

*b. Shall be organised and administered in the manner prescribed by the Act of Parliament.*

*(2).....*

*(3).....*

*(4).....*

*(5) The High Court shall not have jurisdiction of the matters*

*a. Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution*

*Or*

*b. Falling within the jurisdiction of the Courts contemplated in Article 162(2)*

44. Pursuant to the provisions of Article 162(2) of the Constitution, Parliament enacted the Environment and Land Court Act. The objects of the Act as stated in its preambles is as follows:-

*“ An Act of Parliament to give effect to Article 162(2) (2) (b) of the Constitution to establish a superior Court to hear and determine disputes relating to the environment and use and occupation of, and title to, land and to make provision for its jurisdiction and powers, and for connected purposes.”*

45. The Jurisdiction of the Environment and Land Court is set out at Section 13 and includes at Section 13 (2) (a), the power to hear and determine disputes.

“ 13 (2) (a) *Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.*

46. Clearly the High Court lacked the jurisdiction to handle this case whose major thrust relates to land use planning and title to the concerned area of land. The question this court is now being asked is whether in those circumstances, the suit could be transferred as was done herein and the legal effect of this court receiving a matter which as we have found out had been filed in the wrong forum. While admitting that the court ought to down its tools the moment it discovers that it has no jurisdiction, counsel for the Applicant however contended that downing of tools does not mean striking out or refusing to transfer the case. In support of his case Mr. Wasunna referred the court to the decision of Majanja J **in *United States International University (USIU) –vs- The Attorney General & Others (Petition No. 170 of 2012)*** where the Learned Judge opined that the High Court, the Employment and Labour Relations Court and the Environment and Land Court should in the spirit of harmonization, effect the necessary transfers among themselves until such a time as the citizenry is well –acquainted with the appropriate forum for each kind of claim.

47. I have considered the decision by the Honourable Justice Majanja in the USIU case aforesaid vis-avis the circumstances herein. It is notable that the said case was filed in the year 2012, when the Legislations dealing with land and employment enacted pursuant to the Constitution of Kenya 2010 had just come into place. That indeed explains the qualification the Honourable Judge mentioned that in the interest of justice, it would be proper for a while for the Courts to transfer the matters until such a time that the citizenry were acquainted with the proper forum for filing of cases. I did not understand the Applicant herein to be stating that it had through some omission or misadventure filed this case erroneously in the Judicial Review Division of the High Court in Nairobi.

48. In ***James Davies Njuguna –vs- James Chacha & 3 Others (2013) eKLR***, Justice Jonathan Havelock while agreeing with previous decisions states as follows on a matter filed in the wrong forum:-

“ I am guided by Kimaru J. in the Bishop Ndungu case in which the Learned Judge quoted from the finding of Ringera J. (as he then was) in ***Omwoyo –vs- African Highlands & Produce Co Ltd (2002) 1 KLR 698*** in which he stated...”

“ That being the case, the sole issue of determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction.(In) ***Kagenyi –vs- Musiramo & Another(1968) EA 48***, Sir Udo Udoma CJ held in relation to section 18 of the Uganda Civil Procedure Act- a provision which is in *Pari materia* with Section 18 of our Code- that an order to transfer a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. In that case the appellant had sought to transfer a suit from the Magistrates Court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court. And in the very early case of ***Mendonca –vs- Rodrigues(1906 -1980) 2 KLR 51***, Hamilton J held that the High Court did not have power to order a transfer of a suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local jurisdiction of the lower court in which it had been filed. The principle of law to be gleaned from these authorities is that the High Court cannot exercise its discretion to transfer suit from one court to another if the suit is filed in the first place in a court which does not have pecuniary and/or territorial jurisdiction to try it.”

*I agree with the reasoning of the court in the above case. The Applicant cannot apply to transfer a suit which was filed in a court which had no jurisdiction to a court which has jurisdiction. The Applicant cannot purport to cure a mistake which he made when he filed the suit in a court which lacked jurisdiction. It is no excuse that the Applicant, being a layman, had filed the said suit because he was not aware of the court in which he was to file the suit.”*

49. The above sentiments were indeed echoed recently by the Court of Appeal sitting in Mombasa in ***Equity Bank Ltd –vs- Bruce Mutie Mutuku T/A/ Diani Tours & Travel (2016) eKLR*** where Makhandia,

Ouko and M'loti JJ.A.' state as follows:-

*“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 incompetent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow (a) 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 “O<sub>2</sub>” Principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as Judicial Craftsmanship sanctify an otherwise incompetent suit through a transfer.*

50. The Learned Judges of the Court of Appeal (in the Equity Bank Case, supra) further determined and I agree that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eye of the law nothing and therefore the court cannot purport to transfer something and mould it into something through a procedure known as “transfer”. Quoting from the reknowned case of **Macfoy –vs- United African Co Ltd (1961) 3 All ER 1169**, the Learned Judges observed as was held in that famous case that:-

*“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse....”*

51. I think in light of the foregoing, I need not say more. The application that gave birth to the proceedings before me amounted to nothing but a mere nullity having been filed in a court without jurisdiction.

52. Accordingly, I am left with no option but to strike out the application dated 18<sup>th</sup> January 2017 with costs.

**Dated, signed and delivered at Malindi this 27th day of July, 2017.**

**J.O. OLOLA**

**JUDGE**