



**Osman & 3 others (Suing on behalf of the Estate of the deceased Ali Osman) v Osman
(Environment & Land Case 2 of 2023) [2024] KEELC 992 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 992 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND CASE 2 OF 2023
JM MUTUNGI, J
FEBRUARY 28, 2024**

BETWEEN

**ISMAIL ALI OSMAN 1ST PLAINTIFF
NURIA ALI OSMAN 2ND PLAINTIFF
GENYA KHALIF ADAN 3RD PLAINTIFF
HABIBA ALI OSMAN 4TH PLAINTIFF
SUING ON BEHALF OF THE ESTATE OF THE DECEASED ALI OSMAN**

AND

MOHAMUD ALI OSMAN DEFENDANT

RULING

1. Before me for determination is the Defendant’s Notice of Motion application dated June 20, 2023. By the application the Defendant prays:-
 - a. That the Honourable Court be pleased to review its Ruling dated March 22, 2023.
 - b. That the suit be struck out for want of jurisdiction.
 - c. That in the Alternative and without prejudice to prayer No. 2, the Honourable Court be pleased to send back the suit to the Lower Court for the purpose of determination of the value of all that property known as L.R No. Garissa Town/Block 1/81.
 - d. That the costs of this application be borne by the Respondents.
 - e. That the Court grants any other order(s) it deems just and fit.
2. The application was supported on the grounds contained in the Affidavit sworn in support by Mohamud Ali Osman the Defendant on 20th June 2021. The Applicant averred that before the



Trial Court there were two valuation reports, one for Kshs 40,000,000/- and the other for Kshs 18,200,000/-. The Defendant/applicant further averred that the Appellate Court having entertained a doubt whether or not the trial court had the pecuniary jurisdiction to deal with the matter ought not to have transferred the suit, since where a Court lacks jurisdiction, such lack of jurisdiction cannot be cured by a transfer of the suit. The Defendant was of the view that, the trial Court ought to have decided on its own jurisdiction and that the suit ought not to have been transferred to the Environment and Land Court without the issue of jurisdiction of the Lower Court first being determined. The Defendant/applicant referred to the Case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* (2019) eKLR and the Court of Appeal case of *John Adoyo & 6 others v De la Rue Currency & Security print Ltd* (2022) eKLR to support his argument that a suit commenced before a Court without jurisdiction cannot be transferred to another Court since the suit is deemed to have been incompetent *ab initio*.

3. The Applicant urged the Court to exercise its discretion and review the ruling dated March 22, 2023 pursuant to the provisions of order 45 (1) on the basis that there has been a new and important matter which after the exercise of due diligence was not within the Applicants knowledge or could not be produced by him at the time when the order was made and in the alternative the Court can review its order on any other sufficient cause.
4. The Plaintiffs in opposition to the Defendant/Applicant's application filed grounds of opposition dated August 15, 2023. The Plaintiff contended that the Defendant had not satisfied any condition upon which review could be granted to warrant the issuance of an order for review. That the Defendant had failed to annex the ruling and/or order sought to be reviewed and consequently no order for review can issue. The Plaintiff further contended this Court had unlimited jurisdiction to hear and determine the matter and further had power to withdraw any suit or other proceedings pending in a Subordinate Court and thereafter try and dispose of the same. The Plaintiffs further asserted the Defendant's application was vexatious, frivolous and an abuse of the Court process calculated to delay the expeditious hearing and determination of the suit.
5. The application was canvassed by way of written submissions. I have reviewed the application, the affidavit in support and the grounds filed in opposition and have considered the submissions filed by the Counsel for the parties. The issues that arise for determination are whether the Applicant has satisfied the conditions upon which a review maybe granted and whether the suit ought to be struck out for want of jurisdiction and/or should be retransferred to the Subordinate Court for hearing and determination.
6. The present application by the Defendant was triggered by the Ruling of this Court delivered on March 22, 2023. On an application by the Defendant in an appeal he had preferred against a Ruling delivered in an interlocutory application by Garissa Chief Magistrate in Garissa CM ELC No. 001 of 2022 on November 25, 2022. Before the Lower Court two valuation reports were exhibited, one giving the valuation of the suit property at Kshs 18,200,000/- and the other at Kshs 40,000,000/-. The issue of pecuniary jurisdiction was raised by the Defendant, who was the Appellant in the matter before this Court. In the Ruling sought to be reviewed, this Court specifically considered the two reports and at Paragraph 8 of the Ruling the Court *inter alia* stated as follows:-

“ ----- The two differing valuation reports appear to have been tailored to be specifically used by the parties to aid their arguments before the Court. In the case of the Appellant, that the Lower Court lacked the pecuniary jurisdiction to deal with the matter. It is instructive to note that the Respondents filed their suit on 20th January, 2022 and that the Appellant's valuation report was made on 24th January, 2022 presumably after being served with the



suit papers. The Respondents in apparent response to the Appellants valuation report, commissioned the preparation of their own report dated 14th July, 2022. Considering the scenario, it is quite probable that the valuers were influenced by their respective clients in the preparation of the reports.”

7. Given the attendant circumstances the Court considered that it could be possible that the Lower Court lacked the pecuniary jurisdiction to deal with the matter and consequently in exercise of its supervisory jurisdiction and in the interest of doing justice to the parties ordered the Lower Court matter to be transferred to the Environment and Land Court for hearing and determination. The Court predicated its determination on the provisions of section 3 and 19(1) of the *Environment and Land Court Act* as well as Articles 48, 50(1) and 159 (2) of the *Constitution* all which relate to administration of justice in a fair and expedient manner.
8. The Defendant apparently being dissatisfied and aggrieved by this Court’s order has brought the present application seeking a review of the orders issued by the Court on March 22, 2023 and/or to have the suit struck out for want of jurisdiction. Order 45 (1) of the *Civil Procedure Rules* upon which the application is premised provides as follows:-

45(1) (1) Any person considering himself aggrieved—

- (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 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.

Though the Court has unfettered discretion under section 80 of the *Civil Procedure Act* to grant such order as it thinks fit on review, order 45 rule 1 of the *Civil Procedure Rules* prescribes the jurisdiction and scope of review and limits the grounds for review to the following; (a) discovery of new and important matter or evidence which after exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time the decree was passed or the order made or,

- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason. Whatever ground there is the application is required to be made without unreasonable delay.

9. In the present application the Applicant has predicated his application for review on the ground that as the issue of jurisdiction had not been determined by the Lower Court, this Court ought not to have transferred the suit to itself as a suit initiated in a Court without jurisdiction was void abinitio and could not be transferred. The Applicant referred to various authorities to support the proposition to wit – *Shanzu Investments Ltd v Commissioner of Lands* (1993) eKLR, *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* (2019) eKLR, *John Adoyo & 6 others v De La Rue Currency and Security print Ltd* (2022) eKLR and *Abraham Mwangi Wamigwi v Simon Mbiri Wanjiku & another* (2012)eKLR, *Boniface Waweru Mbiyu v Mary Njeri & another*(2005)eKLR and *Wamathu Gichoya v Mary Wainoi Magu* (2015) eKLR . I have perused and given consideration to these authorities and other than reiterating the guiding principles in applications for review and transfer of suits from



one Court to another Court, the authorities have no application in the circumstances of the present application.

10. In the instant matter the two contentious valuation reports were brought to the Courts attention and the Court duly considered them when it rendered its Ruling. The Court equally dealt with the issue of the Lower Court's jurisdiction when it made the Ruling that had been appealed against. The Court clearly gave its reasons as to why it considered a transfer of the suit pending before the Lower Court to this Court for hearing and determination. There was contestation whether or not the Lower Court had the pecuniary jurisdiction to handle the matter owing to the value of the suit property. Each of the parties had a valuation report to back their positions. In a bid to settle the issue of pecuniary jurisdiction so that the suit could proceed to trial on merits, the Court opted to invoke it's supervisory jurisdiction which undoubtedly by virtue of article 165 (6) & (7) as read with article 162 (2)(b) of the Constitution, the Court has over any Subordinate Court exercising jurisdiction over environment and land matters.
11. The Defendant/Applicant in my view has not demonstrated there was discovery of new and important matter or evidence that with exercise of due diligence could not have been availed at the time the order was made. There was equally no error or mistake apparent on the face of the record or indeed any other sufficient reason to warrant review under the provisions of order 45 rule 1 of the Civil Procedure Rules. The Court in making the order it did was cognisant of the valuation reports with conflicting valuations and consciously made the Ruling having full regard of the Lower Courts pecuniary jurisdiction.
12. Essentially the instant application is asking the Court to sit on appeal against its own Ruling. Even if the view is that the Court mis interpreted the law and/misapplied the law, the remedy would not be an application for review but an appeal against the Ruling. See the Case of Republic v Advocates Disciplinary Tribunal Exparte Appollo Mboya (2019) eKLR where Mativo J (as he then was) interalia held:-

“An erroneous order/decision cannot be corrected in the guise of exercise of power of review.”
13. As to whether the Defendants application was fatally defective as no order and/or copy of the ruling was annexed, I am in agreement with the Court of Appeal decision in the Case of Peter Kirika Gitbaiga & another v Rashid (2016) eKLR where they stated as follows:-

“----- Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the Courts attention to that part of the Ruling or Judgment which he complains of, since such decision would be on the Court file anyway, the application for review cannot be rendered fatally defective.”
14. In the present matter there was no doubt as to which Ruling/Order that the Defendant wanted to have reviewed and in what respects. The Defendant felt aggrieved with this Court Order directing that the Garissa CM ELC No. 001 of 2022 be transferred to this Court for hearing and determination. The Defendant was further aggrieved by this Court's failure to hold that the Lower Court lacked jurisdiction to deal with the matter on account of pecuniary jurisdiction and hence to strike out the suit. These are the orders that the Defendant seeks review of but as I have held, the Court made its Ruling upon evaluation of the material that had been placed before the Lower Court and the instant application more or less is questioning the merits of the Court's decision. The Defendant could only challenge the merits of the Court's decision on appeal and not through an application for review. The Defendant through the review application is basically asking the Court to sit on appeal against its own decision. That cannot be done.



15. The applicant's application dated June 20, 2023 is without merit and is dismissed with costs to the Plaintiffs/Respondents.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 28TH DAY OF FEBRUARY 2024.

J. M. MUTUNGI

ELC - JUDGE

