



**Odera (Suing in her Capacity as the Legal Representative and Administrator of the Estate of Gladys Betty Odera - Deceased) v Balozi Housing Co-operative Ltd (Civil Appeal E727 of 2023) [2024] KECA 1177 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1177 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E727 OF 2023  
F TUIYOTT, JW LESSIT & GWN MACHARIA, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**LAVENDER ACHIENG ODERA (SUING IN HER CAPACITY AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF GLADYS BETTY ODERA - DECEASED) ..... APPELLANT**

**AND**

**BALOZI HOUSING CO-OPERATIVE LTD ..... RESPONDENT**

*(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Visram, J.) dated 24th May 2023 in HCCC No. 1075 of 2006)*

**JUDGMENT**

1. In this appeal, the appellant, Lavender Achieng Odera (suing in her capacity as the legal representative and administrator of the estate of Gladys Betty Odera (deceased), is appealing against the ruling and order of Aleem Visram, J. dated and delivered on 24<sup>th</sup> May 2023.
2. A brief context into the facts in dispute as pleaded in the Further Amended Plaintiff dated 14<sup>th</sup> April 2022 is that, by an agreement dated 5<sup>th</sup> January 2004, the deceased acquired proprietary interest in Plot No 119 on LR No 12422/16, Muthaiga North (the suit property) and she was issued with a Certificate of Ownership. By a further agreement dated 5<sup>th</sup> January 2004 executed by the respondent, Balozi Housing Co-operative Society Limited and the deceased, it was agreed that the respondent would construct on behalf of the deceased, a maisonette at a cumulative cost of Kshs 4,582,407/= payable by the deceased, and the respondent was to prepare a sale agreement to that effect. Pursuant to the agreement, it was pleaded that the deceased made payments of up to Kshs 2,220,863/= which payments were duly acknowledged by the respondent.



3. In compliance thereof, the respondent prepared the sale agreement. However, it introduced new terms to the agreement which unilaterally changed the terms initially agreed upon by the parties. On or about 28<sup>th</sup> September 2005, the respondent wrote to the deceased informing her that the suit property would be ready for occupation by the end of October 2005 but subject to the deceased adhering to the new terms of the agreement. Alternatively, the suit property would be sold to third parties.
4. The introduction of the new clauses was strenuously opposed by the deceased who deleted them, but the respondent declined to adopt them. By a letter dated 23<sup>rd</sup> January 2006, the respondent informed the deceased that it would deny her possession of the suit property upon its completion on grounds that she failed to fulfil part of her contractual obligations, by failing to take up a mortgage facility on the suit property.
5. On that basis, the appellant alleged and particularised breach of contract, fraud, deceit, harm, loss and damage on the part of the respondent and prayed for several reliefs against the respondent, being: a declaration that the deceased acquired legal and equitable interest in the suit property; an order compelling the respondent to transfer the suit property to the appellant and failure to which, the Deputy Registrar do sign off the transfer forms in favour of appellant; mesne profits from December 2005 till judgement date; a refund of the present value of the of the suit property; damages for breach of contract; damages for loss of bargain; compensatory and punitive damages for breach of contract; costs and interest.
6. In response to the suit, the respondent filed a defence dated 11<sup>th</sup> December 2007 and later amended on 25<sup>th</sup> August 2022 denying the allegations as presented by the appellant, and it put her to strict proof thereof. In particular, the respondent denied that the superior court had jurisdiction to adjudicate over the dispute since the matter is one between a Co- operative Society and its member, and therefore, the Co- operative Tribunal had jurisdiction.
7. By a Notice of Motion dated 7<sup>th</sup> March 2023, the appellant sought orders that the suit before the Nairobi High Court Civil Division be transferred to the Environment and Land Court for hearing and determination. In opposing the application, the respondent filed a replying affidavit dated 14<sup>th</sup> April 2023, presenting a different dispute resolution forum by which the parties ought to be heard, being the Cooperatives Tribunal established under the *Cooperatives Societies Act*.
8. After considering the facts and the arguments by both parties, the learned Judge was of the view that the suit could not be transferred since it was filed in a court with no competent jurisdiction ab initio; that in as much as the suit was filed prior to the year 2011 before the creation of the Environment and Land Court, there was plenty of opportunity to transfer the suit under the transition provisions which was not done; and that the transition provisions were not intended to apply in the year 2023, a period of 12 years after creation of the special courts. Accordingly, the appellant's Notice of Motion was dismissed with costs.
9. Aggrieved, the appellant is now challenging the decision of the trial court by citing 4 grounds of appeal in her Memorandum of Appeal dated 14<sup>th</sup> August 2023. We pause and observe that the grounds of appeal as cited by the appellant contain subtitles under them. This goes against the grain of rule 88(1) of the *Court of Appeal Rules, 2022* which succinctly provides that a Memorandum of Appeal should be concise without argument or narrative; the grounds of objection to the decision appealed against, specifying: (a) the points which are alleged to have been wrongly decided; and (b) the nature of the order which it is proposed to ask the Court to make.
10. Nonetheless, in summary, the grounds of appeal can be summarised into 2 major points as follows:



- a. Whether the learned Judge misapprehended the import, tenor and purport of the ELC Practice Directions dated 25<sup>th</sup> July 2014.
  - b. Whether the learned Judge erred in law and in fact by finding that it lacked jurisdiction to transfer HCCC No 1075 of 2006 to the Environment and Land Court even though it had been lodged in the correct court.
11. The appellant proposed that the appeal be allowed and orders be issued setting aside the ruling and order of the High Court dated 24<sup>th</sup> May 2023, declining transfer of the suit filed in the High Court, being HCCC No 1075 of 2006 from the High Court at Nairobi Civil Division to the Environment and Land Court at Nairobi for hearing and determination; and that costs be awarded to her.
  12. In support of the appeal, the appellant filed written submissions and case digest both dated 22<sup>nd</sup> April 2024 which were orally highlighted by Mr. Oloo appearing on behalf of the appellant. Counsel condensed the issues for determination into two which are: that the learned Judge misapprehended the object of the 2014 Environment and Land Court Practice Directions on which the application for transfer of the suit was premised; and that Practice Direction number 5, creates a three-pronged test that would be applied in an application for transfer. The first limb of that test, it was submitted, is that the dispute must have been one relating to the environment, use, occupation, and title to land. The second limb is that the case must have been previously filed at the High Court. Thirdly, the hearing in respect to that case, must not have commenced. It was submitted that the appellant's suit in HCCC No 1075 of 2006 met all the three limbs.
  13. Counsel submitted that the learned Judge wrongly exercised his discretion by considering extraneous factors, and in holding that the Practice Directions do not contain a provision that limits the scope of applicability with regards to the duration. It was contended that the Directions do not provide that they could not operate in the year 2023.
  14. Reference was made to this Court's case of *Christopher Wafula Mutoro v Richard Lordia Lokere* (2017) eKLR where it was held that practice directions were transitional although that was not the ratio of the decision. The facts in the case involved the Environment and Land Court's refusal to assume jurisdiction over an appeal from the District Land Dispute Tribunal. The ratio was that the Environment and Land Court could not decline to assume jurisdiction following its creation. It was submitted that the decision does not aid the respondent's case and that the superior court erred in its exercise of judicial discretion.
  15. On the transfer of suits where it had been filed in a court without proper jurisdiction, it was submitted that the learned Judge made a legal error by finding that it could not transfer the suit while the High Court was the only forum that could entertain the dispute and grant the reliefs sought. Counsel referred to *Kagenyi v Musiramo* (1968) EA 43 and *Abraham Mwangi Wamigui v Simon Mbiriri Wanjiku & another* which the learned Judge relied on in reaching his decision of whether a matter filed in a forum without jurisdiction could be transferred to a forum with proper jurisdiction. He contended that reliance on the two cases was an error as the learned Judge failed to appreciate that the suit was filed in the year 2006 and it is only in the High Court that the appellant could seek redress.
  16. Counsel referred to High Court decisions in *Rapid Kate Services Limited v Freight Forwarders & 2 others* (2005) eKLR and *Hangzhou Agrochemicals Industries Limited v Panda Flowers Limited* (Civil Suit 97 of 2009) (2012) KEHC 1937 (KLR) (Civ) (8 October 2012) (Ruling) for the guidelines a court should consider when entertaining an application of transfer of suits.



17. Mr. Oloo stated that the court wrongly assumed that it did not have jurisdiction to entertain or transfer HCCC No 1075 of 2006; and that the appellant has been condemned to languish in the High Court which had no jurisdiction to hear her and therefore driven from the seat of justice.
18. In rebuttal, the respondent filed written submissions contemporaneously with a list and digest of authorities both dated 23<sup>rd</sup> April 2024. Mr. Nthiga, learned counsel for the respondent addressed us on two issues; on jurisdiction of the court to handle the suit that was before it as well as to transfer the suit; and the applicability of the 2014 Environment and Land Court Practice Directions issued by the Chief Justice.
19. It was submitted that the High Court did not have the jurisdiction to handle the dispute before it; that this was a dispute between a member and the Co-operative Society and therefore, the Cooperative Tribunal should be seized of it; and that since the trial court did not have jurisdiction in the first instance, it did not also have jurisdiction to transfer the suit to the Environment and Land Court. In this regard, reliance was placed on this Court's case of *Equity Bank Limited v Bruce Mutie Mutuku t/ a Diani Tour Travel* (2016) eKLR for the proposition that a court cannot order the transfer of a suit which ab initio was incompetently filed before it.
20. On the applicability of 2014 Environment and Land Court Practice Directions, it was submitted that they were issued pursuant to the provisions of section 30(1) of the *Environment and Land Court Act*, which provisions were not meant to apply indefinitely.
21. In support thereof, the respondent relied on the decision by this Court, being Christopher Wafula Mutoro (supra). Referring to the case, counsel contended that by 1<sup>st</sup> July 2015 when the appellant therein made the first application to transfer the appeal to the Environment and Land Court, that Court was operational and transitional provisions including the Practice Directions issued by the Chief Justice pursuant to section 30(1) of the *Environment and Land Court Act* had expired. Therefore, the transitional arrangement under the Practice Directions were not meant to apply 10 years post the publication of those Directions in the Kenya Gazette.
22. It was urged that in as much as the appellant stated that the Judge ignored the principles applicable for transfer of cases, she did not demonstrate which principles were ignored and how they were applicable in the application for transfer.
23. Responding to the appellant's claim that her suit is now in limbo, it was submitted that the suit was alive between the time it was filed in 2006 up until 2023 when the decision was made; and that the claims by the appellant that she has been driven from the seat of justice, is disingenuous since she had the responsibility and duty to have the matter heard and determined expeditiously.
24. We were urged that for the Judge to exercise his discretion, by not allowing the application, it cannot be concluded that he did not act on matters that he should have acted upon in terms of principles set out in *Mbogo v Shah* (1968) EA page 93. This Court can only interfere with exercise of discretion only if it is satisfied that, that discretion was not properly exercised.
25. We have considered the entire record of appeal and the submissions made by both counsel. There are two main issues for consideration before us, being the applicability of the Environment and Land Court Practice Directions and whether there were legal and/or factual errors made by the learned Judge in the impugned ruling and orders made on 24<sup>th</sup> May 2023.



26. The common ground by both parties is that the subject matter of the dispute before the High Court touches on the occupation of, and title to, the suit property. The suit was filed before the High Court in the year 2006 which was prior to the establishment of the Environment and Land Court in the year 2011.
27. The locus classicus on jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1 where the principle established is that jurisdiction is everything and without it, a court cannot make one more step. For if it does, any decision arising therefrom will be considered a nullity and incapable of being enforced.
28. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (2012) eKLR, the Supreme Court held that a court can only arrogate upon itself jurisdiction which has been conferred upon it by the *Constitution*, legislation or both in the following words:
- “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 itself jurisdiction exceeding that which is conferred upon it by law.”
29. Article 162(2) (b) and 3 of the *Constitution* provides:
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.
  2. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
30. The jurisdiction and functions of the Environment and Land Court contemplated under Article 162(3) of the *Constitution* are contained in the now enacted *Environment and Land Court Act*. Section 13(2) of the Act outlines the functions of this Court as follows:
- In exercise of its jurisdiction under Article 162(2) (b) of the *Constitution*, the Court shall have power to hear and determine disputes-
- a. relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - b. relating to compulsory acquisition of land;
  - c. relating to land administration and management;
  - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - e. any other dispute relating to environment and land.
31. The respondent concurs that the High Court did not have jurisdiction to hear and determine the dispute. The point of departure is whether the High Court had the jurisdiction to transfer the suit which was also the main point of determination in the learned Judge’s decision. The reason why the learned Judge declined to transfer the suit was because of the lapse of time of about 13 years since the formulation of the Practice Directions.



32. We digress and address the arguments by both parties relating to the provisions under which the Environment and Land Court's Practice Directions were enacted. The respondent argued that the Practice Directions were enacted pursuant to section 30 while the appellant posits that they were enacted under section 24 of the of the *Environment and Land Act*.

33. Section 24 provides:

1. The Chief Justice shall make rules to regulate the practice and procedure of the Court.
2. The Chief Justice shall make rules to regulate the practice and procedure, in tribunals and subordinate courts, on matters relating to land and environment.
3. The Chief Justice shall in consultation with the Court make rules for the determination of admissibility by the Court of proceedings pending before any court or local tribunal.

While section 30 states:

Transitional provisions

1. All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.
2. The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.

34. Our reading and understanding is that the above provisions are distinct. Section 24 gives the Chief Justice powers to make rules to regulate the practice and procedures before the various dispute resolution fora which deal with matters relating to land and environment. On the other hand, section 30 gives directions on how the disputes which were pending before the various courts before and after the establishment of the Environment and Land Court should be handled. Suffice it to state though is that, the Chief Justice in formulating the Environment and Land Court Practice Directions as gazetted in Gazette Notice No 5178 cited both sections, which in our view cannot be faulted.

35. The Practice Directions regarding matters in the Environment and Land Court by the Chief Justice were published in Gazette Notice No 5178. Particularly, Practice Directions Nos. 4 and 5 state that:

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.
5. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by a judge.

36. The suit was filed in the year 2006 before the Environment and Land Court was established in the year 2011. The learned Judge held that an order for a suit to be transferred cannot be made unless the suit was filed in a court with competent jurisdiction in the first instance. We cannot help but wonder if prior to the establishment of the Environment and Land Court, there was any other forum a supposed aggrieved party would file their case. There was no suggestion coming from either parties or even the learned Judge on the forum in which the appellant ought to have ventilated her request if not in the High Court. We do not think that this was a fit and proper case for a party to have been deemed to have filed their suit in a court without jurisdiction.



37. The above Practice Directions recognised that there were suits involving land disputes which may have been filed before the High Court before the creation of the Environment and Land Court. Therefore, the directions on cases such as the instant one, where hearing had not commenced, was that they were to be transferred to the Environment and Land Court as directed by a Judge. Our finding is that the learned Judge misapplied the principle of transferring the suit when it came to this instance since the suit was not filed in a court of incompetent jurisdiction in the first place.
38. Even if the High Court was not convinced that the suit before it ought to be transferred, the fact that by the time the application for transfer was made the Environment and Land Court had been established, and in view of this Court's holding in *Karisa Chengo & 2 others v Republic* Civil Appeal Nos. 44, 45 & 76 of 2014 (2015) eKLR as regards jurisdiction of specialised courts, the learned Judge ought to have downed his tool and granted the order for transfer. This Court said:
- “A judge appointed to any of the two specialised courts did not have jurisdiction to sit in courts other than the one he/she was specifically appointed to... As for the specialised courts, Parliament envisaged that the judges in those courts would have additional qualifications in terms of experience which judges of the High Court did not necessarily need to have. The law was that those courts needed judges with measurable experience in the specific mandate of the Court. That is due to the special and peculiar nature of the disputes handled by the said courts. The law envisaged that the judges of the two specialized courts had to be different from judges of the High Court in terms of experience and specialization, with different jurisdictions but the same status.”
39. The foregoing crystalizes the position that courts as well as judges and judicial officers, should only operate within the limits confined to them by statutes. To arrogate themselves jurisdiction which they do not possess, the principle which stands is that their decision would amount to a nullity. If there was nothing else to convince the learned Judge that he did not have jurisdiction to hear and determine the suit before him, the lack of additional experience and technical know how to handle matters emanating from environment and land disputes would have been sufficient as was observed by this Court in the *Karisa Chengo & 2 others case* (supra).
40. On the applicability of the transitional provisions, the argument by the respondent is that the same cannot apply now since time has considerably lapsed, being 12 years. Reliance was placed on the case of Christopher Wafula Mutoro (supra) which the respondent argued that this Court set the time limit on the application of transitional provisions.
41. We have considered the facts which gave rise to the decision in the Christopher Wafula Muturi case. The distinct facts are that the appellant was aggrieved by the decision of the Environment and Land Court which refused to be seized of jurisdiction in an appeal from the Chief Magistrate's Court which had heard an appeal from the Land Provincial Appeals Committee. The Court observed that the Environment and Land Act repealed the Land Disputes Tribunal Act and in the absence of a Land Disputes Appeals Committee, which would have ordinarily heard the appeal, the Environment and Land Court was then seized with jurisdiction to determine the appeal.
42. Concerning the interpretation of the transitional provisions of section 30(1) of the *Environment and Land Act*, the Court held as follows: -
- “Secondly, section 30(1) of the ELC Act is a transitional provision. As expressly stated in that section, it operated until the ELC established under the Act comes into operation. The Act commenced on 30th August, 2011. As the ELC found, the Judges of the ELC were appointed on 1st October, 2012 and a judge posted to Kitale Court in November,



2012. So, by 1st July, 2015 when the appellant made the first application for transfer of the appeal to the ELC, the Court was operational and the transitional provisions including the ‘PRACTICE DIRECTIONS’ issued by the Chief Justice as they relate to Section 30(1) had expired with the consequence that ELC had jurisdiction to entertain the pending appeal.”

43. From the above excerpt, we discern that this Court did not in any way oust the jurisdiction of the Environment and Land Court as of 1<sup>st</sup> July 2015. What the learned Judges meant was that there was an automatic conferment of jurisdiction to the Environment and Land Court to hear and determine all environmental and land related disputes even without necessarily a party filing an application to transfer the suit. The transfer of suits to their proper jurisdiction in the specialised courts was nothing but just an administrative process. A holistic reading of the transition provisions leaves no doubt that there is no indication that they were applicable within a period of time.
44. As we come to the end of our judgement, we observe that the respondent argued that the proper jurisdiction under which the appellant should have been heard, was the Co-operative Tribunal since this was a dispute between a Co-operative and its member. The learned Judge did not address himself on the jurisdiction of the Cooperatives Tribunal even after it was deposed by the respondent in its replying affidavit.
45. Having not raised a cross-appeal for this Court to address itself on the proposition that the Cooperatives Tribunal is seized of jurisdiction, it is a well settled principle that matters not canvassed by parties and which the trial court did not get a chance to pronounce itself on, cannot be subject of appeal.
46. In Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others ex-parte Tom Mbaluto (2018) eKLR as cited in Frera Engineering Company Limited v Morris Mureithi Mutembei (2020) eKLR, this Court held that:

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case...In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court....As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”
47. Furthermore, we are of the view that such an argument would have best been dealt with by the court with proper jurisdiction as opposed to one without.
48. In conclusion, we do find that this appeal is meritorious. The learned Judge misapprehended and misinterpreted the import of the Environment and Land Court Practice Directions on the transfer of suits which the High Court did not have jurisdiction. In the premise, the ruling and order of Aleem Visram, J. dated and delivered on 24th May 2023 is hereby set aside. We order that the suit filed before the High Court, being HCCC No 1075 of 2006 be and hereby transferred to the Environment and Land Court for hearing and determination. The appellant is awarded the costs of this appeal.
49. Orders accordingly.



DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

F. W. NGENYE – MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

