



**Montessori Learning Centre (MLC) v Mathu & 2 others (All Jointly Suing as,
and on Behalf of, Kyuna Neighbours Association - KNA) & 2 others (Civil
Application E404 of 2022) [2023] KECA 145 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 145 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E404 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 17, 2023**

BETWEEN

MONTESSORI LEARNING CENTRE (MLC) APPLICANT

AND

**KIMANI MATHU, CHAIRMAN, ATULA SHAH, VICE CHAIRPERSON AND
CHRIS NDEGEWA, SECRETARY (ALL JOINTLY SUING AS, AND ON BEHALF
OF, KYUNA NEIGHBOURS ASSOCIATION - KNA) 1ST RESPONDENT**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES 3RD
RESPONDENT**

*(An application for orders of maintenance of status quo and stay of execution
pending the hearing and determination of an intended appeal from the
Ruling and Order of the Environment and Land Court at Nairobi (Angote,
J.) delivered on 30th September, 2022 in ELC. Appeal No. E032 of 2022)*

RULING

1. The application before us is dated November 3, 2022 brought under rules 1 (2), 5 (2) (b), 42 and 47 of the *Court of Appeal Rules*, seeking orders of maintenance of status quo and stay of execution, of the ruling and order of the Nairobi Environment and Land Court (ELC) Appeal No. E032 of 2022 (Angote, J.) delivered on September 30, 2022.
2. A brief background to the application is that the 1st respondent herein filed National Environment Tribunal (NET) Appeal No. 10 of 2021 before the National Environment Tribunal challenging the decision of the National Environment Management Authority's (NEMA's) decision, authorizing



construction of a proposed school development on Plot LR No. 715/62 Kyuna, Nairobi. The Tribunal, by a ruling delivered on 1 April 4, 2022, struck out the appeal before it for want of jurisdiction and non-compliance with section 129(1) of the *Environment Management and Coordination Act* (EMCA). Aggrieved, the 1st respondent filed an appeal in the ELC for a relief that the substantive appeal be remitted back to the Tribunal for hearing and determination.

3. The 1st respondent also filed an application seeking stay of the decision of the Tribunal and, by a ruling dated September 30, 2022, Angote, J. held that the harm that would result from cutting down decades-old trees, excavating the soil and putting up a permanent structure could not be compensated in damages in the event that the appeal succeeds whilst, conversely, the harm occasioned to the applicant herein could be quantified and remedied by damages; and that the issue of the irreversibility of environmental harm must have been the main consideration for the enactment of section 130(2) of *EMCA*, which provides for an automatic stay of any contemplated activity by the developer the moment an appeal is filed at the National Environment Tribunal.
4. In the impugned ruling, Angote, J. made an order of stay against the decision of NET of April 14, 2022 and granted an injunction restraining the applicant herein or anyone claiming under or through its authority in any way howsoever from undertaking and/or continuing with construction works and/or activity on L.R NO 7158/62 Kyuna, Nairobi pending hearing and determination of the appeal. It is the dissatisfaction with this ruling that has given rise to the instant application.
5. The applicant argues that the effect of the said order is to prevent it from completing works necessary for learning of the children in its institution, which will have the effect of children withdrawing from the school (Centre) for want of facilities for progression. In a nutshell, the applicant argues that the construction and renovation work that had started, but has now stopped, has rendered parents on the verge of withdrawing their children from the school; that if stay of execution is not granted, the respondents shall proceed to execute the order, consequent which the entire substratum of the intended appeal will be shuttered and the appeal rendered nugatory; that, further, that the appeal is arguable, and the school stands to suffer irreparable loss, and that the balance of convenience weights in its favour. To emphasize on the arguability of the appeal, the applicant posited that one main ground of appeal is that the learned judge erred in law and fact by failing to interpret the facts of the case before him and correctly apply the law.
6. Opposing the application, the 1st respondent filed a preliminary objection dated January 19, 2023 as well as a replying affidavit sworn on January 13, 2023 and written submissions of even date. The preliminary objection in a nutshell raises the ground that the instant application is fatally and irredeemably defective, and is for striking out *limine litis* for contravening Section 130(5) of the *Environment Management and Coordination Act*, 1999 as read with article 164(3) of *the Constitution*, and section 3(1) of the *Appellate Jurisdiction Act*, and that it is for dismissal with costs on a full indemnity basis.
7. When the matter came before us for virtual hearing on January 16, 2023, learned counsel for the applicant, Mr. Kiprono, argued that the law had been settled in regard to stay applications, being that a party must demonstrate that the intended appeal is arguable and that, if the order sought is not granted, the appeal would be rendered nugatory. On arguability of the intended appeal, counsel referred us to the Memorandum of Appeal dated October 14, 2022 in Civil Appeal No. 452 of 2022 which, he submitted, raised weighty issues requiring an interrogation by this Court. As for the appeal being rendered nugatory, he submitted that if the construction of the school does not continue, the learning of school going children would be impaired. In any event, no prejudice would be suffered by the respondent by grant of the orders sought.



8. Learned counsel, Mr. Lusi for the respondent, argued that the appeal is not arguable for the reasons that the same, alongside the application, were incompetent for offending section 130 (5) of the *Environment Management and Coordination Act* (EMCA), which provides that the decision of the ELC in its appellate jurisdiction is final and therefore an appeal cannot lie to this court. He also challenged the fact that both the Notice of Appeal and the application herein were filed by two different firms of advocates. As to whether the appeal will be rendered nugatory, he posited that this court has previously observed that, where no arguable appeal has been demonstrated, it ought not to consider whether the appeal would be rendered nugatory. He urged the court to apply the precautionary principle and dismiss the application which, if allowed, would result in irreparable damage to the environment.
9. Counsel further argued that there was a misrepresentation of facts as the dispute did not involve a school that had admitted students for learning; that no student was yet to be admitted in the school as at 15th July, 2021 when the Tribunal issued the construction stop order; and that the dispute did not at all involve the rights of school going children. Instead, it concerned the non-compliance with the law by the developer of the school. It was urged that the application be dismissed.
10. In rebuttal, Mr. Kiprono argued that the applicant's law firm filed its notice of change of advocates on October 28, 2022 in the ELC file, and the only error was failure to serve it during the pendency of the appeal; that what the respondents were challenging was the issuance of change of user to the suit land, which had nothing to do with the environment; and that, although the ELC order was made by the court in its appellate capacity, article 164(3) of *the Constitution* grants this court power to hear appeals from the High Court and courts of equal status. Accordingly, this court had powers to entertain the appeal.
11. Mr. Lusi reiterated that article 164(3) (b) confers jurisdiction to this court to hear appeals from any other court or tribunal as prescribed by an Act of Parliament. Thus, *the Constitution* itself envisages a limitation to the jurisdiction of this court to hear appeals. Further, the Notice of Change of Advocates was filed on January 12, 2022, and not earlier as alluded by the applicants.
12. We have considered the application, the affidavits in support of, and opposition to, the application, the preliminary objection, the respective submissions and the law. Before we delve into the merit of the application, we find it necessary to first address the issue of jurisdiction, for without jurisdiction we have to down our tools on the other issues raised. The challenge to jurisdiction was raised by Mr. Lusi in the preliminary objection and, thus, the foremost issue before us is whether this court is clothed with jurisdiction to determine the application before it.
13. The word 'jurisdiction' is commonly used to refer to the power a court has to decide or adjudicate a case. The *Black's Law Dictionary* 11th edition defines 'jurisdiction' as "A court's power to decide a case or issue or issue decree." Thus, jurisdiction is the authority conferred on a court to decide over matters, and the authority may be conferred by either *the Constitution* or an Act of Parliament or regulation in an Act of Parliament. It is through similar means that the court's jurisdiction is limited or fettered. In the latter case, where jurisdiction is limited, a court is said not to have jurisdiction to hear or adjudicate or decide cases. This explains why the law has severally restated that jurisdiction is everything and without it a court has no power to make one more step. This was stated in the locus classicus case of *Owners of Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage in the dicta of Nyarangi, JA at p.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.”

14. In the instant case, the respondents opposed the application by a replying affidavit simultaneously with an objection that this Court has no jurisdiction to hear and determine, not only the application, but also the intended appeal for want of jurisdiction by virtue of section 130 (1) and (5) of the [Environment Management and Co-ordination Act](#), (EMCA) 1999 which provides that:

- “(1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.
- (2)
- (3)
- (4)
- (5) The decision of the High Court on any appeal under this section shall be final.”

15. Mr. Kiprono pushed the argument that, the above provision notwithstanding, this Court is conferred with jurisdiction pursuant to article 164(3) of [the Constitution](#) which provides:

- “(3) The Court of Appeal has jurisdiction to hear appeals from-
- a. the High Court; and
- b. any other court or tribunal as prescribed by an Act of Parliament.”

16. The provision in section 130(5) of [EMCA](#) is couched in mandatory terms and absolutely bars any appeal from the High Court to this court. The only interpretation of the language employed therein is that final adjudication of matters arising from NET rests with the High Court. Thus, the argument that this Court has jurisdiction to entertain this application or an appeal by virtue of article 164 of [the Constitution](#) cannot clothe this court with the requisite jurisdiction. With due respect to Mr. Kiprono, [the Constitution](#) does not operate in a vacuum, it has to be read and interpreted in conjunction with other written laws. It is Article 163(4) that has commanded the Court of Appeal to only hear appeals from ‘any other court or tribunal as prescribed by an Act of Parliament’. In turn, [EMCA](#) prescribes the limit of jurisdiction of the High Court. Suffice it to note that the ELC is of equal status with the High Court. And therefore, a mere reference only to the High Court at subsection (5) of section 130 of [EMCA](#) applies mutandis mutatis to ELC. In essence, Article 164(3)(b) gives effect to section 130(5) of [EMCA](#) and cannot be read in isolation.

17. For the foregoing reason, we hold the view that this is an application doomed to fail. We have no jurisdiction to entertain it by virtue of section 130(1) and (5) of [EMCA](#). We must down our tools at this juncture. The applicant has to contend with the decision of the ELC, which in any event was issued at an interlocutory stage as the appeal thereof is yet to be heard. The application is accordingly struck out with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

D. K. MUSINGA (P)

.....



JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

