



REPUBLIC OF KENYA



**Abdalla v Ewins (Miscellaneous Application E008 of 2024)
[2024] KEELC 5923 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5923 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION E008 OF 2024
EK MAKORI, J
SEPTEMBER 18, 2024**

BETWEEN

WANJIRU YUSUF ABDALLA APPLICANT

AND

ELIZABETH MWENI EWINS RESPONDENT

RULING

1. The parties in this matter have been entangled in a complex and profound legal battle for a significant period. It all began with a plaint filed by the Respondent against the Applicant dated 18th September 2018, as amended on 29th January 2021 and 3rd February 2021 in Malindi Chief Magistrate Court Civil Case No. 298 of 2018 - *Elizabeth Mweni Ewins v Wanjiru Yusuf Abdalla* seeking several reliefs as disclosed in the amended plaint:
 - a. United Kingdom Sterling Pounds 30,740/- and interest thereon at the prevailing commercial rate of 14% from the date of advancement to the defendant until the date of full payment.
 - b. A declaration that the sale agreement dated 17th February 2015 is invalid and unenforceable for want of consideration and that this Honourable court revokes and cancels the same.
 - c. An order that the Defendant do render and account for all the profits and rent received from management, operation, and use of the premises standing on Plot No. 49 Watamu, popularly known as Sea Whispers Guest House Watamu, from the 17th of February 2015 until the date of giving of vacant possession.
 - d. That the Defendant does give vacant possession of all those premises standing on Plot No. 49 Watamu, popularly known as Sea Whispers Guest House Watamu, from the judgment of this court, failing which the defendant be evicted from that place by the court bailiff of this court with the assistance of the officer commanding station (O.C.S.) Watamu.



- e. Costs of this suit together with interest at such rate and for the period this Honourable Court may deem fit to grant.
 - f. Any other or further relief as this Honourable Court may deem appropriate.
2. Following a comprehensive and meticulous trial, the Trial Court (Hon. Chepseba CM) delivered a judgment in favor of the Respondent on 24th September 2021, and a decree issued on 29th September 2021.
 3. Dissatisfied with this outcome, the Applicant instructed her advocates to lodge an appeal, which was filed at the High Court of Kenya in Malindi—Malindi HCCA No. 87 of 2021 *Wanjiru Yusuf Abdalla v Elizabeth Mueni Ewins*.
 4. The Superior Court (Thande J.) rendered a judgment in that appeal on 19th January 2024, striking out the appeal with costs on what the Applicant’s advocate refers to as an “incompetent appeal” and placing all blame on the Applicant’s erstwhile advocate (I will revert to this issue later).
 5. The Applicant has approached this Court via an application dated 8th February 2024, relying entirely on the grounds thereof and the supporting affidavit of Wanjiru Yusuf Abdalla with annexures to it seeking orders:
 - a. That the instant application be certified as urgent and be heard ex parte in the first instance (spent).
 - b. That the Honorable Court be pleased to grant leave to the Firm of Murage Juma and Company Advocates to come on record for the Applicant, Wanjiru Yusuf Abdalla (this was not opposed).
 - c. Pending the application’s hearing and final determination, the Honorable Court will be pleased to issue a stay of execution of the judgment and decree of Hon. W. Chepseba CM issued in Civil suit No. 298 of 2018, delivered on 24th September 2021, pending the hearing and determination of this appeal.
 - d. That the Honorable Court be pleased to extend time and grant leave for the Applicant herein to file an Appeal (Memorandum of Appeal and Record of Appeal) out of time against the judgment and resultant decree emanating from the decision of the Trial Court - Hon. W. Chepseba CM issued in Civil suit No. 298 of 2018 and delivered on 24th September 2021.
 - e. That the Honorable Court be pleased to issue a stay of execution of the judgment and decree of Hon. W. Chepseba CM in Civil suit No. 298 of 2018, delivered on 24th September 2021 and 29th September 2021, respectively, pending the hearing and determination of the Applicant’s intended appeal.
 6. In opposition to the application, the Respondent filed grounds of opposition dated 16th February 2024 and a replying affidavit sworn by Elizabeth Mueni Ewins dated 26th February 2024 and filed on the same date.
 7. The Court directed parties to file written submissions. They complied. Their submissions are pretty impressive; both learned counsels put a lot of industry into them on the issues at hand, which I will frame shortly. I commend them. They cited several judicial precedents, which I will refer to later in my ruling.
 8. The issues I frame for this Court’s decision emanating from the elaborate materials placed before me by the parties and their respective submissions by counsels - are whether this Court is functus officio (read whether this Court has jurisdiction to entertain the current matter) - given the judgment in place by



the Superior Court (Thande J.). The corollary to that is whether the current application is res-judicata. Whether or not the applicant is entitled to the orders of extension of time to file an appeal out of time and stay of execution pending appeal, and who bears the costs of this application.

9. The orders and the decree emanating from the judgment of Hon. W. Chepseba CM on 24th September 2021 provided that:
 - a. That an order be and is hereby issued that Defendant pay Plaintiff the sum of United Kingdom Sterling Pounds 30,740/- and interest thereon at the prevailing commercial rate of 14% from the date of advancement to Defendant until the date of full payment.
 - b. That a declaration be and is hereby issued declaring that the sale agreement dated 17th February 2015 is invalid and unenforceable for want of consideration and that the same be revoked and canceled by this Honourable Court.
 - c. That an order be and is hereby issued that the Defendant do render and account for all the profits and rent received from the management, operation, and use of the premises standing on Plot No. 49 Watamu popularly known as Sea Whispers Inn Watamu Kenya from the 17th of February 2015 until the date of giving of vacant possession.
 - d. That an order be and is hereby issued that the Defendant do give vacant possession of all those premises standing on Plot No. 49 Watamu, popularly known as Sea Whispers Inn Watamu Kenya, from the judgment of this Court failing which the Defendant be evicted therefrom by the Court bailiff of this Court with the assistance of the Officer Commanding Station (OCS) Watamu.
 - e. That costs of this suit and interest thereon at such rate be borne by the Defendant.
10. Aggrieved with the Trial Court's decision, the Applicant appealed to the Superior Court in Malindi HCCA No. 87 of 2021 *Wanjiru Yusuf Abdalla v Elizabeth Mueni Ewins*. At the judge's direction, the appeal was determined through written submissions and judgment delivered on 19th January 2024, when the appeal was struck out as incompetent with costs to the Respondent. It is reported as [*Wanjiru Yusuf Abdalla v Elizabeth Mueni Ewins* \(Civil Appeal 87 of 2021\) \[2024\] KEHC 133 \(KLR\) \(19 January 2024\) \(Ruling\)](#). I will revert to the same in a moment.
11. Against that backdrop, we have another rematch in the form of an appeal to the ELC (not the High Court this time). The only difference is that the Applicant has instructed a new counsel, with fresh thinking that the erstwhile lawyer missed the point by appealing the decision of the Trial Court to the High Court (not the ELC). The latest advocate thinks that the former advocate should have appealed to the ELC and that the decision by the Trial Court was purely on a land matter.
12. In his submissions on this point, learned counsel Mr. Juma for the Applicant states that Order (b) issued by the Trial Court expressly declared the sale agreement dated 17th February 2015 invalid and unenforceable for want of consideration. The sale agreement was over land and intended to confer ownership rights. This makes the above declaration over ownership of the land. The decision in [*Joel O. Onchiri & 38 others v Ngenda Location Ranching Co. Ltd & another* \[2019\] eKLR](#) is cited where the High Court held that the provisions of Article 162 of the [*Constitution*](#) of Kenya, 2010, as read with Section 13 of the [*Environment and Land Court Act*](#), 2011, the aspects of a suit that concern validity of the contract for sale of land are matters that fall principally within the ELC—noting that in this case, the 1st Defendant a company that was mainly formed to acquire land and to transfer it to its members. The entire dispute, though raising cross-cutting issues, ultimately boiled down to land ownership. The purpose of the suit was to resolve a predominantly dispute on land ownership.



13. In the same spirit, the counsel believes that the predominant test, in this case, is the ownership of Plot No.49 Watamu and the premises elected thereon, Sea Whispers, and its management and control.
14. Mr. Juma proceeded to submit that Order (c), as decreed by the Trial Court, provided that the Applicant was to render an account for all profits and rent received from the management, operation, and use of premises standing on Plot No.49 Watamu. This further crystalizes that the judgment and the suit in the Lower Court had to do with the use, occupation, and ownership of land. Rent arises from the use of land. Management and operation of premises situated on land also relate to the occupation of land still within this Court's jurisdiction.
15. The counsel asserts further that any doubt is dispelled by Prayer (d), which provides that the Applicant was to give vacant possession of all premises standing on Plot No.49 Watamu, popularly known as Sea Whispers. This further confirms the entire suit, decree, and judgment-issued order relating to possession, occupation, and ownership of land Plot No.49 Watamu, rent, and management of Sea whispers erected on the land.
16. Mr. Juma cites Section 13 (2) of the [Land and Environment Court Act](#), which provides the jurisdiction of the Court pursuant to Article 162(2)(b) of the [Constitution](#), which creates the ELC.
17. In fostering the jurisdiction question, the counsel referred this Court to the decision in [Philip Jalang'o v Ryan Properties Limited](#) [2020] eKLR where Bor J. held:

“The Defendant referred extensively to the terms of the sale agreement in its defence, and contended that the Plaintiff did not terminate the agreement for sale properly in line with the provisions of that agreement. It denied the allegations of fraud levelled against it and challenged the Plaintiff's claim for loss and damages. Looking at the pleadings filed by the parties it is clear that this is a dispute relating to a contract granting the Plaintiff an enforceable interest in the land which falls under Section 13 (2) (b) of the [ELC Act](#). The orders the ELC is empowered to grant in exercise of its jurisdiction include injunctions, specific performance, compensation, damages and declarations. The predominant issue for determination in this suit is the rights and obligations of the parties under the sale agreement, which falls within the jurisdiction of the ELC and not the High Court.
18. Learned counsel finally referred the Court to the Respondent's amended Plaintiff dated 3rd February 2021, paragraphs 3A, 4A, 4B, and 4C, which all confirm that the matter relates to the purchase and ownership of land. In the said paragraphs, the Respondent has pleaded how he allegedly bought the subject property and, as such, claims to be its owner.
19. On the contrary, Mr. Kilonzo, learned counsel for the Respondent, submits that this is an appeal of the decision of Thande J. through the backdoor; it offends the doctrine of *functus officio* as elaborated in [Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others](#) [2016] and [Telkom Kenya Limited v John Ochanda \(Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited\)](#) [2014]eKLR, since there is no appeal preferred to the Court of Appeal against the judgment of the Court in Malindi HCCA No. 87of 2021 and the instant application amounts to an attempt by the applicant to collaterally challenge the decision and judgment of Thande J., which is not juridically tenable as this is a Court of equal status to the High Court. For the reasons above, the counsel submits that this Court lacks jurisdiction by dint of the doctrine of *functus officio*; thus, the Applicant's application is not tenable before this Court; hence, it should fall.



20. Jurisdiction is everything when raised; the Court should deal with it immediately. See Nyarangi JA in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

21. The jurisdiction question here is that the current application seeks to appeal the decision of my sister, Thande J. The Court is being asked to sit as an Appellate Court over the decision in Malindi HCCA No. 87 of 2021 *Wanjiru Yusuf Abdalla v Elizabeth Mweni Ewins*. It cannot be. The two Courts have coordinate jurisdiction.
22. I agree with the submissions by Mr. Kilonzo, learned counsel for the Respondent, that this Court has no jurisdiction to handle the current Motion because it is a direct appeal of Thande J’s decision from the side door. It is a rematch on the same issues that a competent Court of jurisdiction of equal status with the ELC has fully and finally settled. On that point alone, I will move no further step but down tools in the manner proposed below.
23. Reverting to the judgment in *Wanjiru Yusufu Abdalla v Elizabeth Mweni Ewins* (Civil Appeal 87 of 2021) [2024] KEHC 133 (KLR) (19 January 2024) (Ruling) delivered on 19th January 2024, when the Superior Court struck out the appeal as incompetent with costs to the Respondent, the judge elaborately set the reasons for the striking out of the said appeal as incompetent and stated as follows:

Order 42 of the *Civil Procedure Rules* lists the documents that must be on the court record. Rule 13(4) provides as follows:

Before allowing the appeal to go for hearing, the judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party, that is to say-

- a. The memorandum of appeal;
- b. The pleadings;
- c. The notes of the trial magistrate made at the hearing;
- d. The transcript of any official shorthand, typist notes, electronic recording, or palantypist notes made at the hearing;
- e. All affidavits, maps, and other documents whatsoever put in evidence before the magistrate;
- f. The judgment, order, or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that –

“

- “i. a translation into English shall be provided of any document, not in that language;



- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

As can be seen from the above provision, the record of appeal is required to contain the listed documents. The Court may however dispense with the production of any document it deems irrelevant. Notably, the production of the memorandum of appeal, the pleadings and the decision appealed against may not be dispensed with. In the instant case, some of the notes of the trial magistrate made at the hearing as well as documents put in evidence before the trial court are missing from the record. This Court has not dispensed with the production of the same. In the premises, the record of appeal is incomplete.

24. Citing several authorities on the importance of completeness of record of appeal, including the Supreme Court decision in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR, the judge proceeded to state:

“(41) Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law or the Constitution where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.

Duly guided, I find that with an incomplete record, the appeal is incompetent and defective. The Court is thus divested of the jurisdiction to consider the issues placed before it, as the conditions set by law have not been met.

The upshot is that the Appeal herein, being incompetent is hereby struck out with costs to the Respondent.”

25. The judge reached the position above well, knowing she was vested with jurisdiction to deal with the appeal. The appeal had been properly admitted. None of the parties raised the question of jurisdiction, not even the Respondent. The Superior Court was conscious that it had jurisdiction before admitting the appeal. It cannot be raised here, and I cannot deal with it. It is grounds for the next court—the Court of Appeal. It was not the first time the Superior Court (read the High Court and not the ELC) had handled the matter. Nyakundi J. dealt with an interlocutory appeal filed by the Applicant herein challenging the refusal of adjournment by the Trial Court. It is part of the materials placed before this Court. That appeal is reported as *Wanjiru Yusuf Abdalla v Elizabeth Mueni Ewin* [2021] eKLR. The appeal was dismissed, leading to the final disposal of the suit in the Lower Court, now the subject of the current appeal.
26. Let me digress a bit. Even if the Superior Court (the High Court) was to deal with the issue of jurisdiction on merit, the claim before the Lower Court was purely recovery of monies arising from a debt advanced by the Respondent to the Applicant and a failed sale of land agreement leading to a plea for recovery of rent and the taking of accounts. The contract of sale did not materialize. A refund was ordered in Sterling Pounds, with corollary eviction and enforcement orders directed to the Court Bailiff and area OCS for compliance. The issue of ownership of Plot No.49 Watamu, popularly known as Sea Whispers, for adjudication in the Lower Court and the subsequent appeal to the Superior Court.



27. The jurisdiction question between the ELC and the High Court on matters relating to charges, mortgages, collection of dues, and rent has been raging in the past. That question has been with us since the ELC was constituted in 2012. The Court of Appeal in *Co-operative Bank Limited v Patrick Kangethe Njuguna & 5 Others* [2017] provides the manner to reckon that question:

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the *ELC Act* ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues, and rents which fall within the civil jurisdiction of the High Court.”

28. It is elaborated by this Court in the case of *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR, Ombwayo J., having analyzed the averments in the plaint in a matter before him, stated as follows:

“The substratum of the suit therefore relates to the legal charges and the subsequent statutory power of sale. The court that has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the chargee has since been settle by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others* [2017] eKLR where the court held as follows.....”

Significantly, he proceeded to state:

The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

29. Debt recovery and the corollary reliefs were issues within the sphere of the High Court. In my view, the erstwhile lawyer for the Applicant was right in appealing to the High Court and not the ELC. The unfortunate aspect that caught the eye of the Superior Court was the failure to provide a proper record of the Appeal, leading to the judge striking out the appeal as incompetent, as elaborately placed above.

30. I agree with the Respondent that progress is needed in any matter being litigated, and litigation has to come to finality. The doctrine of *res judicata* prevents parties from repeatedly filing suits that have been previously dealt with and adjudicated upon. The Respondent filed a suit against the Applicant in CMCC No.298 of *Elizabeth Mueni Ewins v Wanjiru Yusuf Abdalla*, where judgment was entered in favor of the Respondent. After the decision of the said Court delivered on the 24th September 2021, the Applicant herein filed a Notice of Motion dated 1st October 2021 for a stay of execution of the decree of the Court given pursuant to the said judgment pending the hearing and determination of her appeal No. Malindi HCCA No 87 of 2021- *Wanjiru Yusuf Abdalla v Elizabeth Mueni Ewins*. Similarly, after the Trial Court delivered the verdict on 24th September 2021, Ali Salim Vae, Shumi Salim Vae, and Lailatu Salim Vae, as Interested Parties, filed a Notice of Motion dated 4th October 2021, seeking to stay the execution of the judgment and decree of the Trial Court delivered on 24th September 2021. The Motions were all determined by Hon. Dr. Julie Oseko, CM (as she then was), in a joint ruling dated 23rd March 2022, where all the applications by the Interested Parties were dismissed with costs. A conditional stay of execution pending appeal was granted to the Applicant, as shown from the



annexures and the orders arising from the said ruling. The Applicant failed to satisfy the conditions given by Hon. Dr. Julie Oseko CM in the orders issued on the 10th May 2022, pursuant to the ruling of the Court dated 23rd March 2022 regarding the stay of execution leading to the partial execution of the decree of the Court dated 24th September 2021. The Applicant herein, by a Notice of Motion dated 3rd June 2022, sought a further stay of execution and enlargement of time to comply with the orders of conditional stay of execution given by Hon. Dr. Julie Oseko CM. On the 23rd March 2022, Hon. D.Wasike SRM on 22nd June 2022 allowed a further stay in the following terms:

- a. The time to which the Applicant is to deposit the decretal sum as ordered by the court on the 23rd of March 2022 is extended for a further 30 days.
- b. The conditional stay of execution granted on the 23rd March 2022 is reviewed so as to apply to the proclamation Notice in regard to the unexecuted portion of the decree in that eviction of the Applicant from Sea View Whispers Inn and giving of vacant possession to the Respondent having been done shall not be upset.
- c. As the Respondent is in possession of Sea Whispers Inn, the Applicant is under no obligation to deposit the monthly rent of the Sea Whispers Inn in court as ordered on the 23rd March 2022 as this has been overtaken by events.
- d. All the other orders and conditions as ordered on 23rd March 2022 stand.
- e. The Applicant shall bear the costs of the Application.

31. Therefore, it is evident that this is not the first time the Applicant has approached this Court seeking orders of stay. The conditional orders issued by the Lower Court were not fulfilled, and therefore, the issue rested at that level. It appears it was not raised before Thande J. The conditional orders were not fulfilled. Or put it this way: The Applicant had a chance to raise the question of stay in Malindi HCCA No 87 of 2021- *Wanjiru Yusuf Abdalla v Elizabeth Mueni Ewins*. It was not raised. It cannot be revived here. It was latently before the Superior Court in the appeal. It is constructively dead. See *John Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, on the rationale behind *res judicata*:

“...The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability, which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence...”

32. Given the preceding and what I have stated, the Respondent's replying affidavit dated 26th February 2024 shows that the Lower Court decision has been executed. There will be nothing to stay – the Motion Application herein is a fait accompli.

33. The upshot is that the application dated February 8, 2024 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 18TH DAY OF SEPTEMBER 2024.



E. K. MAKORI

JUDGE

In the Presence of:

Mr. Juma, for the Applicant

Ms. Oloo. for the Respondent

Happy: Court Assistant

