



County Government of Kakamega & another v BCM Abled Disabled Group (Civil Appeal E033 of 2025) [2025] KEHC 7126 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E033 OF 2025**

S MBUNGI, J

MAY 28, 2025

BETWEEN

COUNTY GOVERNMENT OF KAKAMEGA 1ST APPELLANT

MUNICIPAL MANAGER, KAKAMEGA MUNICIPALITY 2ND APPELLANT

AND

BCM ABLED DISABLED GROUP RESPONDENT

JUDGMENT

1. This is a ruling on a motion dated 26.03.2025, filed by the applicant herein seeking the following orders:
 - a. Spent
 - b. That this Honorable court be pleased to stay proceedings before the Magistrates Court being Kakamega MCCC E119 of 2024 pending the hearing and determination of this application.
 - c. That this Honorable court be pleased to stay the orders of the court in Kakamega MCCC E119 of 2024 to the effect that the appellants.
 - d. That the costs of the application be provided for.
2. The application was premised on the grounds on the face of it as well as the supporting affidavit sworn by Justus Wabuko, the Legal Officer of the 1st Appellant.
3. The Appellants contend that the Respondent obtained conservatory orders from the lower court based on an application dated 19th September, 2024, which was never substantively heard or determined, thereby depriving the Appellants of a fair hearing.
4. It is further contended that the orders granted are detrimental to public interest as they have the effect of crippling operations at a public toilet situated at Muliro Gardens, Kakamega.



5. The Appellants assert that the Respondent continues to operate the facility without a valid lease agreement or payment of rent, in contravention of the Kakamega County Finance Act 2025, and to the prejudice of the successful bidder, Kambi Somali Self Help Group, who were awarded the lease in compliance with public procurement law.
6. The Appellants aver that the previous lease agreement between the 1st Appellant and the Respondent expired in May 2024 and that the public facility was re-tendered through Tender No. CGKK/KM/Lease Toilets/01/2024-2025, advertised in the Daily Nation on 6th June, 2024. The Respondent participated but was unsuccessful in the bidding process.
7. Despite this, the Respondent remains in continued unlawful occupation of the premises. The Appellants argue that this amounts to misuse of public property and is contrary to both Article 227 of *the Constitution* and the *Public Procurement and Asset Disposal Act*.
8. The Appellants further highlight that an application dated 11th October 2024, filed by the Respondent seeking to withdraw the initial conservatory orders, is yet to be heard, thus leaving the legal status of the said orders uncertain and procedurally irregular.
9. The Appellants therefore pray that in the interest of justice and public interest, and to prevent further procedural unfairness and unlawful use of public property, this Court intervenes by staying both the lower court proceedings and orders.
10. A replying affidavit dated 04.04.2025 was filed by the respondent sworn by Joseph Kinuthia, the chairman of the Respondent group.
11. The Respondent contends that the application is fatally defective, arguing that the court lacks jurisdiction to grant the orders sought under the legal provisions cited by the Appellants.
12. It is further deponed that the Appellants have failed to demonstrate the risk of substantial loss, and that the appeal would not be rendered nugatory should the orders not be granted. The Respondent also contends that there is no imminent risk of finalizing the proceedings in the lower court.
13. The Respondent asserts that there is no legal or factual basis laid by the Appellants to justify the orders sought and maintains that rent continues to be paid as previously agreed, thereby rebutting the claim of misuse or unauthorized occupation.
14. On 9th April, 2025 the appellant/applicant filed another motion, primarily seeking leave of the court to amend the Notice of Motion dated 26th March, 2025 due to inadvertent omission in terms of the prayers sought.
15. The court directed that the parties first submit on whether this court has jurisdiction to entertain the Appeal as filed, or it is the Environment and Land court which has requisite jurisdiction to hear and determine the matter.
16. At the time of writing this ruling, only the respondent had filed submissions.

Respondent's Submission on jurisdiction.

17. Vide submission dated 23rd April, 2025, the respondent submitted that the court lacks jurisdiction to entertain this appeal.
18. The Respondent submitted that the grounds of appeal contained in the Memorandum of Appeal are general and fail to clearly set out the nature of the dispute that was before the lower court. However, an analysis of the application and supporting affidavit reveals that the underlying issue revolves around



the existence and expiry of a lease agreement between the 1st Appellant and the Respondent, in respect of the IKO Toilet at Muliro Gardens.

19. The Respondent submitted that the Appellants' application and affidavit raise issues related to land use, tenure, and leasehold interests in public land, which fall within the purview of the Environment and Land Court, not the High Court.
20. It is the Respondent's submission that by virtue of Section 13(2)(a) and (d) of the *Environment and Land Court Act*, the Environment and Land Court has exclusive jurisdiction to hear disputes relating to land use planning, title, tenure, and rates; and to contracts and other instruments granting enforceable interests in land.
21. Consequently, the Respondent invoked Article 165(5)(b) of *the Constitution*, which expressly limits the jurisdiction of the High Court in matters reserved for courts established under Article 162(2)(b) of *the Constitution*, namely the Environment and Land Court.

Analysis and Determination.

22. I have carefully gone through the applications, the supporting affidavits, the replying affidavit, and submissions filed by the respondent.
23. The main issue for determination is whether this court has jurisdiction to entertain the application for stay of proceedings and the memorandum of appeal filed by the appellant/applicant.
24. The court in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR addressed the issue of jurisdiction as follows: -

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

25. In Phoenix of E.A Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR the Court of Appeal at paragraphs. 19 and 20, reaffirmed in the following words the right position of the law – in respect to suits filed before Courts which have no requisite jurisdiction:-

“We are not persuaded that the proposition by the Respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the Court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The Subordinate Court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction...”

26. From the application and rival submissions by both parties, it is evident that the dispute revolves around the expiry of a lease agreement, the subsequent tendering and award of a new lease, and the continued occupation of the leased premises by the Respondent after the lapse of the lease. These issues directly touch on land use, tenancy, leasehold interests, and occupation of public land, all of which are matters within the exclusive jurisdiction of the Environment and Land Court.



27. Section 13 of the *Environment and Land Court Act* grants this Court with original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of the ELC Act or any other law applicable in Kenya relating to environment and land. Article 162 (2) (b) of *the Constitution* demarcates the jurisdiction of the ELC Court by enacting that it 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.
28. It is thus clear that the dispute as presented squarely falls under the scope of the Environment and Land Court's jurisdiction. This court, therefore, lacks jurisdiction to entertain the Application for Stay of Proceedings and the Appeal filed herein.
29. Accordingly, the application dated 26th March, 2025 and the accompanying Memorandum of Appeal are hereby struck out for want of jurisdiction, with costs to the Respondent.
30. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF MAY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a

Ms Akini holding brief for Ms Mmbaka for the 1st and 2nd Applicants present.

Ms Namange for the respondent present online.

