



**Oluoch v Omulo & another (Miscellaneous Civil Application  
E339 of 2023) [2024] KEHC 1798 (KLR) (26 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1798 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION E339 OF 2023  
DKN MAGARE, J  
FEBRUARY 26, 2024**

**BETWEEN**

**SAMUEL OUMA OLUOCH ..... APPLICANT**

**AND**

**QUINTER AYOO OMULO ..... 1<sup>ST</sup> RESPONDENT**

**KENYA INDUSTRIAL ESTATE LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is an application to extend time within which to Appeal. The Applicant filed the appeal within time but the same was struck out by the environment and land court for lack of jurisdiction. The period from the striking out and filing of this Application is very few days. The overall delay appears to be over one year.
2. However, an Appeal was filed within time, in a court the Applicant thought was within the jurisdiction of the Environment and Land Court. This matter is a consequence of the unnecessary split between the three courts of equal status.
3. The Applicant filed an Appeal within before time in the Environment and Land Court. The said court struck out the Appeal. The matters in dispute are within what was addressed in the case of *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, the high court stated as doth:-

“ 103. After a wide-ranging analysis and consideration of the applicable provisions of the Constitution and in particular, Articles 165(3), 162(2) and (3), and section 13 of the *Environment and Land Court Act*, and the amendments thereto, the five Judge Bench of the High Court held as follows: –

In its strict sense the “jurisdiction” of a Court refers to the matters the Court as an organ not an individual was competent to deal with



and reliefs it was capable of granting. Courts were competent to deal with matters that the instrument, be it the *Constitution* or a piece of legislation, creating them empowered them to deal with. Such jurisdiction could be limited expressly or impliedly by the instrument creating the Court.

The jurisdiction of the High Court was unlimited save only as provided by the *Constitution*. The High Court had express jurisdiction to deal with and determine matters of a Constitutional nature under article 165(3) of the *Constitution*. Indeed, while the Constitutional claw back was found under article 165(5), article 165(3) (e) of the *Constitution* further confirmed that the High Court's jurisdiction could be extended further pursuant to any statutory provision. For example the *Judicature Act* which conferred the specialized admiralty jurisdiction. The *Constitution* however did not provide for any other written law to limit the jurisdiction of the High Court.

Both the High Court and the ELC Court had a concurrent and or coordinate jurisdiction and could determine Constitutional matters when raised and do touch on the environment and land. Neither the *Constitution* nor the *ELC Act* limited the High Court's jurisdiction in that respect ....

A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions had been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents.

..... It could not have been the intention of the draftsmen of the *Constitution* that when the Court was faced with a mixture of causes of action touching on the *Constitution*, especially on fundamental rights, a separationistic approach was to be adopted by the Court and half the claim dispatched to one Court as the other half was retained.

104. A similar position was held by a three-judge bench in *Leisure Lodges Ltd v Commissioner of Lands & 767 others*<sup>[51]</sup> citing the above decisions.
105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in



*Suzanne Butler & 4 Others v Redhill Investments & Another*<sup>152</sup> the Court stated the test in the following words:

"When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

4. Parties filed submissions. It is unnecessary to restate them herein given the diverse views and the requirements of this court as ordained under Article 159(20) of the Constitution to do justice. The bottom line is that there was no delay in filing the appeal. The delay was occasioned by the Court of Equal Status striking out a memorandum of Appeal. The Applicant was left at a crossroads. The matters raised have land-related questions. It is not out of caprice that the Appeal was filed but due to confusion and 3 different schools of thought that have emerged.
5. The three schools of thought are not fully defined, there is the predominance principle which is used to transfer a suit to a court with predominant issues. Then there is the administration school that posits that a matter should be administratively transferred and Lilian S school of jurisdiction. In that school, there is either jurisdiction or there is none.
6. This court is not sitting on an Appeal from that court. The delay was fully explained. The parties had stay pending appeal. The court will not re-address afresh the aspect of stay, since the court had hitherto found the same merited. Until the correct procedure is settled by higher courts such Applications shall continue being filed and we shall continue allowing them.
7. Consequently, I allow the application of each party to bear its costs. The instructions client to bear any auctioneer's costs so far incurred.

#### **Determination**

- a. Leave be granted to the applicant to file an appeal out of time. The Memorandum of Appeal is to be filed within 21 days from today.
- b. There be stay of execution in Mombasa CMCC 759 of 2019, pending hearing and determination of the intended appeal.



- c. The security provided hitherto shall continue being the same and on similar terms as hitherto ordered.
- d. The instructing client to bear any auctioneer's costs.
- e. Each party to bear its costs
- f. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Mr. Kazungu for the application

No appearance for Respondent

Court Assistant - Brian

