



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau v Ng’obe (Civil Appeal 226 of 2019)  
[2024] KEHC 4433 (KLR) (Civ) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4433 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 226 OF 2019**

**CW MEOLI, J**

**APRIL 26, 2024**

**BETWEEN**

**DAVID NDUNG’U KAMAU ..... APPELLANT**

**AND**

**PATRICK GICHUHI NG’OBE ..... RESPONDENT**

**RULING**

1. David Ndung’u Kamau (hereafter the Applicant) filed the Notice of Motion (the Motion) dated 29<sup>th</sup> July, 2023 seeking that the order made to the effect that the appeal stood automatically dismissed with effect from 20<sup>th</sup> February, 2023 be set aside, and the appeal be reinstated. The Motion which is expressed to have been brought under Sections 1A, 1B, 3A and 18(1) of the *Civil Procedure Act* (CPA) and Order 12, Rule 7; Order 42, Rules 20 and 21, and Order 51, Rule 1 of the *Civil Procedure Rules* (CPR) is premised on the grounds featured on its face and amplified in the supporting affidavit of the Applicant.
2. In his affidavit, the Applicant stated that the delay in prosecuting the appeal was occasioned by the challenges encountered by his advocates in obtaining certified copies of the typed proceedings to enable them compile and file the record of appeal. The Applicant also stated that nonetheless, the record of appeal was filed on 16<sup>th</sup> February, 2023 but due to further delay in the confirmation of payment of fees, the appeal stood dismissed for want of prosecution with effect from 20<sup>th</sup> February, 2023.
3. It was his averment that unless the orders sought are granted, he stands to suffer grave prejudice since the appeal relates to the property known as LR No. Dagoretti/kangemi/126 (the subject property) which he owns. That in contrast, no prejudice is likely to be visited upon Patrick Gichuhi Ng’obe (hereafter the Respondent) who has similarly challenged the same judgment delivered by the lower court by way of an appeal, namely ELCA No. 33 of 2019.



4. The Respondent resisted the Motion by swearing a replying affidavit on 29<sup>th</sup> September, 2023. Therein, he stated that the delay in prosecution of the present appeal was purely the result of indolence on the part of the Applicant. The Respondent deposed that contrary to the averments in the Motion and supporting affidavit, certified copies of the lower court proceedings were ready and available as at 7<sup>th</sup> July, 2021 and which fact he was personally aware of since he too challenged the lower court judgment by way of an appeal to the Environment and Land Court (ELC), and later filing his record of appeal on 6<sup>th</sup> October, 2021.
5. He further deposed that subsequently, his advocates served a copy thereof on the Applicant's advocate on 21<sup>st</sup> June, 2022 and which included the certified copies of the proceedings. It was his averment that the delay on the part of the Applicant, in filing the record of appeal at the earliest opportunity, has therefore not been sufficiently explained. Pointing out moreover that, this court lacks jurisdiction to entertain the present appeal, in view of the fact that it relates to the landed property. On the premise of those averments, the Respondent urged that the Motion be dismissed with costs.
6. The Applicant rejoined with a supplementary affidavit sworn on 29<sup>th</sup> October, 2023 and stating inter alia, that the averments in the replying affidavit have no relevance in the present matter since ELCA No. 33 of 2019 was ultimately dismissed by the ELC on 26<sup>th</sup> October, 2023. The Applicant further maintained that there has been no indolence on his part in prosecuting the appeal, restating his earlier averment that any delay occasioned in filing the record of appeal resulted from the failure on the part of his advocates to make timeous payments. He maintained that his appeal raises arguable issues and that the Motion has been brought in good faith. Thus, the court was urged to exercise its discretion in his favour.
7. The Motion was canvassed by way of written submissions. In urging the court to allow the Motion as prayed, counsel for the Applicant anchored his submissions on the provisions of Section 3A of the CPA on the inherent power of the courts to make such orders as may be necessary to meet the ends of justice. Counsel further anchored his submissions on the decision in *Wachira Karani v Bildad Wachira* [2016] eKLR regarding the principle of sufficient cause as a consideration in setting aside a dismissal order; as well as the decision rendered in *John Nabashon Mwangi v Kenya Finance Bank Limited (In Liquidation)* [2015] eKLR on the constitutional right of a party to be heard. Counsel then reiterated the contents of the Applicant's affidavits as set out hereinabove, save to add that the appeal is now ripe for hearing.
8. On the part of the Respondent, his counsel while citing Order 42, Rule 35(2) of the CPR, argued that the appeal was rightly dismissed, owing to the delay on the part of the Applicant in complying with the directions given for its prosecution. Counsel further argued that in any event, this court lacks jurisdiction to entertain the appeal, pursuant to Article 162 (2) (b) of the *Constitution*, 2010 and Section 13 of the *ELC Act* No. 19 of 2011, which dictate that a dispute of a nature similar to the appeal, falls within the jurisdiction of the ELC.
9. The court has considered the rival affidavit material and the submissions filed plus the authorities cited therein. Concerning the preliminary issue raised by the Respondent regarding the court's jurisdiction to hear the present appeal, it cannot be emphasized enough that the question of jurisdiction is a pertinent issue of law.



10. The legal principle is that jurisdiction is everything and that without it, a court cannot perform any further action in a matter. This position was reaffirmed by the Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR when it held thus:

“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. In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989):

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v. Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.



We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

11. The argument brought forth by the Respondent is that pursuant to the provisions of both the Constitution and the ELC Act, the subject property which is the subject matter of the present appeal falls within the jurisdiction of the ELC and not the High Court. Interestingly, the Applicant did not at all respond to this issue whether in his supplementary affidavit or by way of his submissions. That notwithstanding, upon perusal of the memorandum of appeal herein and the averments made by the respective parties, it is evident that the subject property (being a parcel of land) and matters relating thereto are at the heart of the dispute and therefore, the appeal.
12. That being the case, a special court has been established to handle disputes of such nature. The Constitution, 2010 under Article 162(2) sets out the following:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

...

(b) the environment and the use and occupation of, and title to, land.”
13. Pursuant to the above, the ELC was established to deal with issues relating to the environment and land. The ELC Act which establishes the ELC stipulates the following under Section 13:

“(1)The Court shall have 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 this Act or any other law applicable in Kenya relating to environment and land.

(2) 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.”
  14. From the foregoing, the court is satisfied that the dispute represented in the appeal falls well within the purview of the ELC and therefore, this court lacks jurisdiction in the matter. This means that no competent appeal existed here, even prior to dismissal and therefore capable of reinstatement as sought in the Motion.
  15. Consequently, the Notice of Motion dated 29<sup>th</sup> July, 2023 is hereby dismissed, with costs to the Respondent.



**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Ms. Tuwei h/b for Mr. Kirui

For the Respondent: N/A

C/A: Erick

