



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**ELCA NO. 49 OF 2020**

**EPHANTUS NYAGA NGOROI.....APPELLANT**

***VERSUS***

**NDWIGA STEPHANO.....RESPONDENT**

**RULING**

1. I am called upon to determine a preliminary objection dated 14.07.2021 and filed on 15.07.2021. The objection targets the appeal as filed. The objection is premised on two (2) grounds as follows:-

*i) That the entire Appeal is a nullity ab initio having been initially filed in a court that lacks jurisdiction.*

*ii) That the Appeal as initially lodged offends the provisions of Article 162(2)(b) of the Constitution.*

2. The Appellant herein is **EPHANTUS NYAGA NGOROI** who was the Plaintiff in the lower court while the Respondent is **NDWIGA STEPHANO** who was the defendant. The preliminary objection is brought by the Respondent.

3. The suit before the court was Embu CMCC No. 45 of 2007 filed by the appellant in which he sought a vesting order for one acre of L.R No. Kagaari/Kanja/787 or in the alternative a refund of Kshs. 556,000/=. The orders had been sought based on an alleged sale agreement between himself and the respondent. The suit was heard and determined before the lower court and the same was dismissed and costs awarded to the respondent.

4. The appellant, aggrieved with the decision of the lower court, filed an appeal before the high court in Civil Appeal No. 61 of 2016. The appeal was set down for hearing and was pending judgment. However, on 23.11.2020 the issue of jurisdiction was brought to the court's attention and the court made an order that it lacked jurisdiction. It subsequently transferred the matter to the ELC Court.

5. The appellant filed a notice of motion dated 4.2.2021 seeking orders that the appeal and pleadings filed before the High Court be deemed as properly filed before the ELC court. It was argued that the appeal was inadvertently filed before the high court and that the purpose of the application was to regularize the court's pleadings on record so that the court's record would be in tandem with the law. It was deposed that the parties had filed submissions and the matter was pending judgment at the time of transfer to this court. Accordingly the appellant pleaded that the application ought to be allowed in the interest of justice and that no prejudice would be occasioned to the respondent considering he had already filed submissions on the appeal.

6. The application was opposed by way of replying affidavit and notice of preliminary objection. The replying affidavit was sworn by advocate for the respondent. It was averred that the appeal had been instituted in a court that lacked jurisdiction to adjudicate on

the dispute between the parties and that from a legal perspective the high court could not transfer the matter to the present court when it lacked jurisdiction in the first place. It is argued that there was nothing for the court to transfer and the only avenue was for the appellant to withdraw the appeal and institute a fresh one.

7. The respondent was of the view that the fact that the parties had filed submissions on the appeal did not remedy the lack of jurisdiction of the high court. It was pleaded that the respondent would suffer prejudice if the application is allowed as the parties had been litigating over this matter for over 14 years. According to the respondent, the fact that the appellant was represented by counsel, then filing of the appeal in a court that lacked jurisdiction was inexcusable. It was deposed that the respondent had instructed counsel on record to seek for dismissal of the application and striking out of the appeal.

8. The preliminary objection was canvassed by way of written submissions. The appellant filed his submissions on 8.12.2021. The appeal is said to have been filed before the high court for reason that the appellant's claim was hinged on damages for forgery, injunctions and trespass. The court is said to have noted the issue for trespass which prompted it to transfer the matter to appeal to the ELC. The appellant identified two issues for determination.

9. The first was whether the appeal was a nullity for having been filed before a court that lacked jurisdiction. According to the appellant, the appeal was properly before the court. He justified filing the appeal before the high court by arguing that the prayers sought in the plaint were of a civil nature which the high court could determine. It is argued that the transfer to this court was to have the court with full jurisdiction determine the appeal. On this issue it was ultimately submitted that equity follows the law and that the appellant's prayer was to have the appeal adjudicated upon based on the evidence presented before the court.

10. The second issue was whether the appeal initially lodged offended the provisions of Article 162(2)(b) of the Constitution. It was submitted that though the Constitution established the ELC to hear and determine environment and land matters, the case at the magistrate's court raised issues that would have been determined by the High court too. Ultimately the appellant argued that the initial appeal before the high court was irregular but not illegal.

11. The respondent filed his submissions on 25.1.2022. He reiterated that the transfer of the appeal by the high court to ELC Court was due to the fact that the High Court lacked jurisdiction. According to him, the appellant's justification of filing the appeal at the high court based on the prayers sought in the lower court was not supported by the pleadings. It is argued that by filing the application dated 4.2.2021 the appellant had conceded to have filed the appeal in the wrong forum.

12. The respondent is of the view that the issue for consideration is whether an appeal filed in a court lacking jurisdiction regains legal efficacy if transferred to the court with jurisdiction. Reliance was made on the provisions of Article 162(2)(b) of the Constitution which vests jurisdiction for determination of environment and land matters to the Environment and Land court. It is said that the contention between the parties was an alleged sale of land by the respondent to the appellant which dispute did not fit within the jurisdiction of the high court.

13. On whether the transfer cured the jurisdictional defect, the respondent relied on the case of **Embu County Government Vs University Of Embu [2020] Eklr** which cited with approval the case of **Phoenix of E.A Assurance Co. Ltd Vs S.M Thiga t/a Newspaper Service [2019] eKLR** which held that a suit filed in a court devoid of jurisdiction is dead on arrival and cannot be transferred or remedied. Further reliance was made on the case of **Thomas Mutuku Kasue Vs Housing Finance Ltd (HFC) & Another [2021] Eklr** which cited with approval the case of **Kagenyi Vs Musivamo & Another [1968] EALR 43**, where it was held that an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it.

14. It was reiterated that the dispute was on a contract for sale and any aggrieved party wishing to prefer an appeal would have lodged it at the Environment and Land Court. It was submitted that the transfer to the ELC from a court that lacked jurisdiction did not rectify the infringement. It was finally submitted that the appeal was a proper candidate for striking out.

15. I have considered the objection as raised, the submissions by the parties, and the court record. What amounts to a preliminary objection was described in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696**, where it was held as follows:

*“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear*

*implication out of pleadings, and which if argued as a preliminary point may dispose of the suit..... “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.*

16. A preliminary objection therefore is one that raises a pure point of law based on the assumption that the facts pleaded are undisputed. The respondent has raised two grounds in their preliminary objection to wit; that the entire Appeal is a nullity ab initio having been initially filed in a court that lacks jurisdiction; and that the Appeal as initially lodged offends the provisions of Article 162(2)(b) of the Constitution. I have looked at the grounds therein. They both essentially challenge the jurisdiction of the court to determine the appeal. The issue of jurisdiction is a pure point of law which if determined can dispose of the suit without determining it on it’s merit, hence it qualifies to be raised as a preliminary objection.

17. The first ground of objection challenged the legality and validity of the appeal filed before the court for the reason that it was filed in a court that lacked jurisdiction. From the court records, it is not in dispute that the present appeal was brought before this court by way of transfer from the High Court. The High Court ordered the transfer on grounds that it lacked jurisdiction to determine the appeal.

18. The appellant concedes that indeed the High Court transferred the matter to the ELC court. However, he contends that he had properly filed the appeal before the high court as some of the prayers which he had sought in the lower court were of a civil nature which could be determined by the high court. According to him, the transfer to the ELC court was to have the court with full jurisdiction determine the appeal.

19. The respondent on his part is of the view that the matter before the court was a land matter and the appeal therefore ought to have been filed before the Environment and land court. It is his contention that the transfer was a nullity for reason that a court which lacks jurisdiction has no powers to transfer a matter to a court with jurisdiction and the transfer in itself did not cure jurisdictional defect in the appeal. The matter is said to have been at the judgment stage with both parties having filed their submissions before the said transfer.

20. The issues therefore for determination are whether the high court had jurisdiction to determine the appeal and if not whether the transfer of suit from a court without jurisdiction clothed this court itself with jurisdiction to handle the appeal. As alluded to above, this suit was transferred by the high court to this court for reasons that the said court lacked jurisdiction to handle the matter.

21. The appellant however argues that the suit was properly before the High court for reasons that the claim before the lower court was on damages for forgery, injunctions and trespass. According to him, the matter was only transferred to the ELC court when the court is said to have noted the issue of trespass. It then transferred the matter to a court with full jurisdiction.

22. I have perused the pleadings and though I note that the high court pronounced itself on the issue of lacking jurisdiction to handle the matter, I find it worthwhile to state that the cause of action or claim in the suit was centered an alleged sale agreement of land parcel L.R No. Kaagari/Kanja/787. The appellant sought a vesting order for the said land or in the alternative a refund of Kshs. 556,000/=. The suit before the lower court was therefore a land dispute and any appeal or action emanating from that suit remained a land matter.

23. The jurisdiction of courts to handle land disputes is conferred on the courts by both the Constitution and statute.

**Article 162(2) of the Constitution** stipulates as follows;

*“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to... the environment and the use and occupation of, and title to, land”.*

Further **Section 13 of the Environment and Land Court Act** provides as follows,

*“(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"*

24. It therefore follows that the nature of dispute being a land matter, then by virtue of the express provisions of Article 162(2) of the constitution and Section 13 of the Environment and Land Act, then the proper court to handle the appeal was the Environment and Land Court.

25. The appellant has further argued that the High court had jurisdiction to determine some of the prayers it sought on damages and forgery and not the prayer for trespass. From the pleadings, I did not come across such prayers. However, even then, such an argument cannot stand. A court of law cannot have part jurisdiction to determine some things and not others. A court can either have jurisdiction or not have it at all. There is nothing in law like full or half jurisdiction as argued by the appellant. There are therefore no two ways about it. Having already determined that the matter before the court fell within the jurisdiction of the Environment and Land Court, then it is clear that the High Court lacked jurisdiction to entertain the appeal before it.

26. As alluded to above the High court lacked jurisdiction to handle the appeal and therefore transferred the matter before this court for determination. The issue now for determination is whether the transfer by the high court was in order. Can a court that lacks jurisdiction transfer the matter to a court with jurisdiction" Courts have pronounced themselves on the exercise of power to transfer suits or appeals by a court that lacks jurisdiction.

27. In the case of **Boniface Waweru Mbiyu vs. Mary Njeri & Another MISC. APPLICATION NO. 639 OF 2005** the court expressed itself as follows:

*"Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court".*

28. Further, the court of appeal in the case of **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR CIVIL APPEAL NO. 244 OF 2010** stated as follows

*"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.*

29. I share in the reasoning of the above cases. A court that lacks jurisdiction cannot transfer a suit to a court with jurisdiction. At the time of filing the appeal, the same ought to have been filed in the court with jurisdiction and by virtue of being filed at the high court, then automatically the suit became a nullity. Such suit is defective and cannot be cured by a transfer.

30. The appellant has pleaded with the court to allow the appeal in view of the fact that the parties had filed submissions and the

matter was pending judgment at the time of transfer to this court. According to him, allowing the appeal would be in the interest of justice and no prejudice would be occasioned to the respondent. From the pleadings, it is evident that the parties had filed submissions to the appeal at the high court and the same was pending judgment. However, in my view, though the matter was pending judgment the entire proceedings before the High court were void. The appeal in itself the minute it was filed before the high court which lacked jurisdiction, it was also void and so were the subsequent proceedings and pleadings before that court.

31. The court of Appeal, in the case of **Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR**, cited with approval the case of **Macfoy v United Africa Co LTD [1961] 3 All ER, 1169**, where it was stated:

*“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”*

32. I therefore find that the transfer by the High Court to the Environment and land Court did not give any legal efficacy or legitimacy to the appeal. The same was already a nullity and it could not be revived. The High court, having already found that it lacked jurisdiction, ought to have downed its tools and dismiss the suit for want of jurisdiction. The issue of jurisdiction was well discussed in the locus classicus case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) where the court stated:**

*“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....”*

33. The second ground of objection is that the Appeal as initially lodged offends the provisions of Article 162(2)(b) of the Constitution. I have discussed this in length earlier in my ruling. The appeal being a land matter, its jurisdiction was limited to the Environment and Land court. I find merit in this ground as well.

34. In the circumstances I find merit in the entire preliminary objection. The appeal before this court is a nullity and is therefore dismissed with costs to the respondent.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **22<sup>ND</sup> DAY** of **MARCH, 2022**.

In the presence of Ndolo for Mureithi for respondent and Rose Njeru for Ithiga for appellant.

Court Assistant: Leadys

**A.K. KANIARU**

**JUDGE**

**22.03.2022**



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