



**2TS Savings & Credit Co-operative Ltd & another v NIC Bank Ltd & another
(Miscellaneous Application 410 of 2016) [2023] KEHC 3818 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 410 OF 2016**

OA SEWE, J

APRIL 27, 2023

BETWEEN

2TS SAVINGS & CREDIT CO-OPERATIVE LTD 1ST APPLICANT

ATHANAS NDAU 2ND APPLICANT

AND

NIC BANK LTD 1ST RESPONDENT

ESTONE MWAENGO 2ND RESPONDENT

RULING

1. Notice of Motion dated February 21, 2022 was filed by the applicants, 2TS Savings & Credit Co-operative Society and Athanas Ndau, under Articles 6, 48 and 159(2) of the [Constitution of Kenya](#), Sections 1A, 1B, 3A and 63 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya and Order 45 Rule 81, and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#). They prayed for orders that:
 - a Spent
 - b Spent
 - c Pending the inter partes hearing and determination of the application, the Court be pleased to set aside the *ex parte* proceedings in Nairobi CMCC No 1437 of 2016;
 - d That the Court be pleased to transfer Nairobi CMCC No 1437 of 2016 to Mombasa Law Courts for fresh hearing and final disposal;
 - e That the Court be pleased to issue further or better orders as shall meet the ends of justice.
 - f That the costs of the application be provided for.



- 2 The application was supported by the affidavit of Mr Peter Omwenga, Advocate, in which he averred that, vide a Notice of Motion dated April 19, 2016, the applicants sought orders to have proceedings in Nairobi CMCC No 1437 of 2016: NIC Bank Ltd v 2TS Savings & Credit Co-operative Ltd & Others transferred to Mombasa Law Courts for hearing and final disposal; that on August 2, 2016 the High Court in Mombasa (Hon Ongeru, J) delivered its ruling herein and consequently allowed the application. Mr Omwenga further averred that correspondence was thereafter exchanged between the parties communicating the decision of the Mombasa Court pursuant to which the Nairobi file was sent to Mombasa Chief Magistrate's Court and assigned a new number as Mombasa CMCC No 316 of 2017. He however complained that, in spite of the express order for transfer, the lower court (Hon Nyakweba, PM) erroneously reversed the transfer orders issued herein by Hon Ongeru, J on the false premise that the orders were only temporary. Accordingly, the applicants now seek that the Nairobi suit be re-transferred to Mombasa for disposal in accordance with the ruling delivered on August 2, 2016 by Hon Ongeru, J. He added that their strenuous attempts to have the file returned to Mombasa have yielded no results; and that in the meantime, the suit has been proceeded with in Nairobi and is pending judgment.
- 3 In response to the application, a Replying Affidavit sworn by Mr Brian Mwirigi Mbabu, Advocate, was filed herein on April 1, 2022, in which it was averred that the instant application is merely intended to delay and/or frustrate the 1st respondent's efforts in recovering an outstanding loan that was advanced to the 1st applicant. He was of the view that the order by Hon Ongeru, J was simply a stay pending the hearing and determination of the application; and therefore that the order was not a final order for transfer. Mr. Mbabu further averred that, if the applicants were aggrieved, then they ought to have taken action by either appealing the order of Hon Nyakweba or moving the lower court for its review.
- 4 At paragraphs 10 and 11 of the Replying Affidavit, Mr Mbabu averred that Nairobi CMCC No 1437 of 2016 came up before the trial court in Milimani Commercial Courts for hearing on various dates; and that notices were duly served on the applicants' advocates, who would send representatives and at times fail to attend court altogether. Counsel added the instant application was filed almost 6 years after the suit was filed; and is therefore merely intended to frustrate the respondent from recovering the loan amount.
- 5 The assertions by the respondents were denied by the applicants vide the Further Affidavit sworn by Mr Omwenga on April 21, 2022. He reiterated the assertion that the lower court suit was returned to Nairobi against the express orders of Lady Justice Ongeru; which orders were conclusive in nature. He added that the orders made by Hon. Nyakweba are improper and therefore not binding on the parties as a lower court cannot purport to overrule a decision made by a superior court.
- 6 Directions were thereafter given herein on May 12, 2022 for the disposal of the application by way of written submissions. The record shows that only counsel for the applicant complied and filed his written submissions on July 6, 2022. He gave the background of the application and underscored the assertion that the learned magistrate had no jurisdiction to reverse or ignore that decision. He cited Articles 48, 50 and Chapter 10 of the Constitution of Kenya in support of his submissions and relied on *Shah v Mbogo & Another* [1967 EA 116, *Wachira Karani v Bildad Wachira* [2016] eKLR and *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR, among other authorities, to buttress his argument that the court has unfettered discretion to grant the orders sought.
- 7 There appears to be no dispute that the Nairobi suit was filed by the 1st respondent on March 9, 2016 for recovery of some Kshs 2,454,936/= being the balance due and owing to the 1st respondent as at April 17, 2015 in respect of a loan facility extended to the applicants. The applicants opted to defend the suit and duly filed their Defence. They thereafter filed this Miscellaneous matter on May 10, 2016



seeking that the Nairobi matter be transferred to the Chief Magistrate’s Court at Mombasa on the ground that the cause of action arose in Mombasa; and that they, as the defendants, were residents of Mombasa.

8 The application for transfer was heard and determined by Hon. Ongeru, J on August 2, 2016. At paragraphs 4 and 5 of the Court’s ruling, it was stated thus:

The parties submitted orally in court. I have considered the oral submissions by the parties and my findings are as follows;

- i. There is no dispute that the defendant and the witnesses reside in Mombasa.
- ii. There is also no dispute that the sums are payable through NIC Mombasa Branch. It is prudent have this matter be transferred to Mombasa Law Courts.

9 There is further no dispute that the Nairobi suit was in fact transferred to Mombasa and assigned a new number, namely, Mombasa CMCC No 316 of 2017. Correspondence to that effect were annexed to the Supporting Affidavit as Annexure P-04. It is evident that thereafter, when the matter was placed before Hon Nyakweba, PM, on September 26, 2017, he issued orders to the effect that:

1. The order granted by Hon A Ongeru Mrs Judge in Misc. Application No 410 of 2016 is not final and cannot form the basis upon which this suit was transferred from the Milimani Commercial Courts Nairobi.
2. Accordingly the file in Milimani being Civil Case No 1437 of 2016 be and is hereby returned to the said court.”

10 Thus vide a letter dated September 27, 2017, the file was returned to Nairobi for hearing and determination. There is correspondence exhibited by the applicants to demonstrate that their Advocates wrote a letter to the Executive Officer, Milimani Chief Magistrates’ Court, to inform the court about the ruling dated August 2, 2016 by Hon Ongeru, J and to request that the file be placed before the court for appropriate orders. It is also manifest that the applicants’ advocates sought for interpretation of the true import of the orders made by Hon Ongeru J in the aforementioned ruling. In the meantime, the Nairobi suit proceeded to hearing and was on the verge of judgment when the instant application was filed.

11 Given the aforementioned circumstances, the issue for my determination is whether sufficient cause has been shown for the re-transfer of Milimani CMCC No 1437 of 2016 from Nairobi to the Chief Magistrate’s Court in Mombasa. The general position, as set out in Section 18 of the [Civil Procedure Act](#), is that:

- 1 On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
 - a transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - b withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - i try or dispose of the same; or
 - ii transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or



iii retransfer the same for trial or disposal to the court from which it was withdrawn.

2 Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn”.

12 It is noteworthy however that, in this instance, a similar application had been made by the applications that culminated in the ruling and orders of August 2, 2016. Thereafter, upon the Nairobi suit being transferred to Mombasa Chief Magistrate’s Court and after being assigned a new number, the lower court issued orders which had the effect of reversing the orders of August 2, 2016. I therefore have no hesitating in holding that, in the circumstances, the options open to the applicant for correcting what it perceives to be an illegal order by Hon. Nyakweba, PM, was either by way of review or appeal.

13 In the premises, the application dated February 21, 2022 is untenable and is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF APRIL 2023

OLGA SEWE

JUDGE

