



REPUBLIC OF KENYA



**Co-operative Bank of Kenya Limited v Said (Miscellaneous Application  
E008 of 2023) [2023] KEHC 20907 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20907 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
MISCELLANEOUS APPLICATION E008 OF 2023**

**WM MUSYOKA, J**

**JULY 28, 2023**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... APPLICANT**

**AND**

**MOHAMMED HASSAN SAID ..... RESPONDENT**

**RULING**

1. The Motion for determination is dated January 18, 2023, and principally seeks transfer of a suit filed at the Busia Chief Magistrate's Court, being Busia CMCELC No 555 of 2021, from that court to the High Court. The grounds are that the respondent would like to file a counterclaim, to the tune of Kshs 25,830,150.00, yet that amount exceeds the pecuniary jurisdiction of the trial court.
2. The applicant has filed grounds of opposition, dated 20<sup>th</sup> March 2023, arguing that there was no evidence to support the allegation that the value of the disputed property was Kshs 25,830,150.00, for the available evidence placed the value at Kshs 17,500,000.00, and the pecuniary jurisdiction of the Chief Magistrate's Court is Kshs 22,000,000.00.
3. Directions were given on April 14, 2023, for disposal of the Motion, by way of written submissions.
4. In the written submissions by the applicant, it is argued that the Chief Magistrate had no pecuniary jurisdiction over the matter, and that jurisdiction properly lay with the High Court, and that was where the suit ought to be tried, hence the application. Section 5 and 7(7)(a) of the *Magistrates' Court Act*, No 26 of 2015, Article 165(3)(a) of the *Constitution of Kenya, 2010*, *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited* [1989] eKLR (Nyarangi, Masime & Kwach, JJA) and *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ) are cited. The respondent submits around stay of proceedings and jurisdiction of the magistrate's court. Section 7(1) of the *Magistrates' Court Act*, *Mohamed Shally Sese (Shah Sese) vs. Fulson Company Limited & another* [2006] eKLR



- (Makhandia, JA) and *In re Estate of Meshack Nyangi alias Nyangi Kabuga (Deceased)* [2019] eKLR (Limo, J) are cited.
5. On whether the magistrate's court would have jurisdiction over a suit or counterclaim for or of Kshs 25,830,150.00, the short answer would be no. The *Magistrates' Court Act*, is quite explicit about that. The decisions in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited* [1989] eKLR (Nyarangi, Masime & Kwach, JJA), *In the Matter of Interim Independent Electoral Commission* [2011] eKLR (Mutunga CJ, Baraza DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Ndung'u, SCJJ) and *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ) are on point, so far as jurisdiction is concerned. It is granted by either the *Constitution* or by statute, and where it is not given or conferred, it does not exist. On whether the value of the counterclaim is Kshs 17,500,000.00 or Kshs 25,830,150.04, I note from the counterclaim, that the applicant counterclaims for Kshs 25,830,150.04. The value of the loan granted to the respondent was Kshs 17,500,000.00, but the money the applicant seeks from the respondent is the principal amount of Kshs 17,500,000.00, plus interest on it, which pushes the amount to Kshs 25,830,150.04, which goes beyond the jurisdiction of the magistrate's court.
  6. Once it is established that the magistrate's court would have no jurisdiction to determine a dispute over Kshs 25,830,150.04, the next consideration should be whether a case pending before a court without jurisdiction would be transferable from that court to the High Court. Neither of the parties addressed me on that. The overwhelming judicial opinion, voiced in such cases as *Charles Omwata Omwoyo vs. African Highlands & Produce Co. Ltd* [2002] eKLR (Ringera, J), *Edward Mubangiri Mugambi vs. Habib Bank Ltd* [2012] eKLR (L. Njagi, J), *Hangzhou Agrochemical Industries Ltd vs. Panda Flowers Limited* [2012] eKLR [2012] KEHC 1937 (KLR) (Odunga, J), *Jabali Chondo Kavuu vs. Suleiman Omar Mwarogo* [2021] eKLR (Munyao Sila, J), *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA) and *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (Karanja, Gatembu & Sichale, JJA), to the effect that where a suit is incompetent on account of jurisdiction, the court has no jurisdiction to transfer it to the court with jurisdiction. The argument is that the suit would be incompetent, and the court ought not to transfer an incompetent suit to the other court, for that other court ought not to entertain a suit that was originally incompetent.
  7. Is the suit, in Busia CMCELC No 555 of 2021, incompetent for want of jurisdiction? No it is not. It was filed over a dispute on a loan amount of Kshs 17,500,000.00, in a court whose pecuniary jurisdiction is a maximum of Kshs 20,000,000.00. So, it was filed within jurisdiction. The issue of jurisdiction now arises only because the applicant is saying that its counterclaim goes beyond the pecuniary jurisdiction of the court where the suit is pending, and it is asking that the suit be transferred to the court with pecuniary jurisdiction over the counterclaim.
  8. Should I order the transfer? I believe I should. The suit was initiated within jurisdiction, but the counterclaim revolves around an amount which pushes the matter beyond jurisdiction. The suit was not filed by the applicant. The applicant did not choose to file the counterclaim before the court without pecuniary jurisdiction to determine it, it was compelled to, as the suit had already filed in that court, by the time it became necessary that a counterclaim be filed. Denying the Motion by the applicant would mean that it would have to file a separate suit at the High Court, to prosecute the suit in the counterclaim, when, ideally, that claim ought to be agitated in the same suit as the claim by the respondent. There would be duplicity, should the applicant be forced to file a separate suit, instead of urging its case within Busia CMCELC No 555 of 2021. The best way forward ought to be to have Busia CMCELC No 555 of 2021 withdrawn from the Chief Magistrate's Court, and transferred to the High Court, for disposal of both the plaint and the counterclaim.



9. The respondent submitted on stay of proceedings. I have determined the principal prayer in the Motion, on jurisdiction and transfer of the suit, and that ought to render the stay prayer in the Motion otiose, for that prayer would have culminated in an order that would have served the purpose of staying Busia CMCELC No 555 of 2021, pending determination of the instant Motion, which I have hereby determined.
10. I find merit in the Motion, dated January 18, 2023, and I hereby allow it. The file, in Busia CMCELC No 555 of 2021, shall be withdrawn from the Chief Magistrate's Court, and transferred to the High Court, at Busia, for disposal. Each party to bear their own costs. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 28<sup>TH</sup> DAY OF JULY 2023**

**W MUSYOKA**

**JUDGE**

**Mr. Arthur Etyang, Court Assistant.**

**Appearances**

Mr. Owuor, instructed by Ogejo Omboto & Kijala, Advocates for the applicant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.

