



**Soko Safi Limited v Garden Estate Limited (Miscellaneous Application E743 of 2022)
[2023] KEHC 21292 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E743 OF 2022**

FG MUGAMBI, J

JULY 28, 2023

BETWEEN

SOKO SAFI LIMITED APPLICANT

AND

GARDEN ESTATE LIMITED RESPONDENT

RULING

1. Before the court is the application dated September 22, 2022 brought under section 3A and 18 of the *Civil Procedure Act*, Order 50 of the *Civil Procedure Rules*, 2010 and all enabling provisions of the law. The application seeks the following orders:
 - i. The Honourable court be pleased to transfer Nairobi Cmcc No E410 Of 2022 *Garden Estate Lts Vs Soko Safi Ltd* from the Chief Magistrates court to this Honourable court for hearing and final determination.
 - ii. Costs of this application be provided for.
2. The application was premised on the grounds set out on the face of it, supporting affidavit sworn by Samuel Gicheru Mburuon September 22, 2022 and written submissions dated March 6, 2023. The genesis of this application is a suit filed by the respondent against the applicant in CMCC NO 410 OF 2022, *Garden Estate Ltd V Soko Safi Ltd*. The suit is premised on a dispute which arose from a lease agreement between the parties dated November 5, 2020.
3. Briefly, the applicant justifies the need for the transfer of the suit on two grounds. Firstly, that since the dispute relates to a breach of contract, the same fell under the jurisdiction of this Court. Secondly, the applicant states that the counterclaim it has raised in the suit exceeds the pecuniary jurisdiction of the subordinate court which is Kenya Shillings twenty-million (KSh 20,000,000/=).



4. The application was opposed by a replying affidavit sworn by Jacqueline Akinyion February 27, 2023, Grounds of Opposition filed on even date and submissions dated March 16, 2023. The gist of the objection by the respondent is that the lease agreement that the applicant was relying on for its prayers in the plaint did not exist and that the applicant was misleading the Court. In the circumstances the respondent averred that the suit had been properly filed in the lower court and that the prayers could be satisfactorily addressed without the transfer. In any case, the respondent averred that the counterclaim was defective as it was not accompanied by a verifying affidavit.

Analysis

5. I have carefully considered the application the response as well as the written submissions and evidence presented by the parties in support of their respective stands. The only issue for determination is whether Nairobi CMCC NO E410 of 2022 *Garden Estate Ltd v Soko Safi Ltd* should be transferred to this court.

6. The applicant invoked section 18(1) of the *Civil Procedure Act* which provides 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.”

7. The application for transfer is premised on the lack of jurisdiction of the lower court. The locus classicus in this subject, is the *Owners of the Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd*, (1989) case where the court stated that:

“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.”



8. The pecuniary jurisdiction of the Chief Magistrate’s Court is spelt out in section 7(1) of the [Magistrates Court Act](#) which provides that:

“A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—

(a) Twenty million shillings, where the court is presided over by a chief magistrate;”

9. From the evidence presented before this Court, it is clear that the applicant filed a Statement of Defence and Counterclaim dated June 28, 2022. This is not denied by the respondent who only states that the same is defective. Paragraph 24 of the said pleading specifies the prayers sought by the applicant against the respondent. These are:

- i. Refund of KShs 1,050,000/=.
- ii. A declaration that the plaintiff has constructively terminated the lease agreement dated November 5, 2020.
- iii. An order directing the plaintiff to pay to the defendant the agreed indemnity cost of Kshs 20,000,000/=.
- iv. Interest on (a) and (c) from the date of filing suit until payment in full.
- v. Costs of the suit.

10. I note that the respondent denies the existence of the lease, the validity of the counterclaim and the merit of the claim of KShs 20,000,000/= by the applicant. This Court cannot at this stage determine these matters. These are for the trial court to determine upon receipt of evidence. For now, this court is required to look at the claim by both parties and make a determination from that without getting into the merits or otherwise of the claim. In other words, even the view that the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction does not hold water. I again revert to the Court of Appeal’s finding in [Joseph Muthee Kamau & Another V David Mwangi Gichure & Another](#), (2013) eKLR to the effect that:

“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. It is therefore obvious against this background, that the counterclaim as raised by the applicant exceeds the pecuniary jurisdiction of the lower court. The question therefore is whether the court can exercise its jurisdiction to transfer the suit.

12. Again, judicial pronouncements from the Court of Appeal on this subject are in abundance and they binding on this court. I start by pointing out the position by JB Ojwang, J (as he then was) in the case



of *Boniface Waweru Mbiyu V Mary Njeri & Another*, [2005] eKLR. The Learned Judge expressed himself on the effect of a matter filed before a court with no jurisdiction 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”.

13. Likewise, the Court of Appeal in *Equity Bank Limited V Bruce Mutie Mutuku t/a Diani Tour travel*, (2016) eKLR held that:

“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 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.”

14. This position was later re-emphasized in *Phoenix of East Africa Assurance Co Ltd V S M Thiga T/A Newspaper Service*, (2019) eKLR again by the Court of Appeal, 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 complaint one in the court seized with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction on itself.”

Determination and orders

15. I believe I have said enough to reflect on the issue before this Court. This court finds that the suit, which is the subject matter of this application, is incompetent and void in law *ab initio*; and therefore, it is not a suit that can be transferred to any other Court.
16. Ultimately, all orders emanating from CMCC No 410 of 2022, *Garden Estate Ltd V Soko Safi Ltd* are null and void. The application herein is untenable and it is dismissed. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 28th DAY OF JULY 2023.



F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

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