



**Kenya Bureau of Standards v Yiwu Raoao Trading Co Limited & 2 others (Civil Appeal 119 of 2019) [2023] KEHC 21739 (KLR) (Civ) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21739 (KLR)

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

**CIVIL**

**CIVIL APPEAL 119 OF 2019**

**CW MEOLI, J**

**AUGUST 10, 2023**

**BETWEEN**

**KENYA BUREAU OF STANDARDS ..... APPELLANT**

**AND**

**YIWU RAOAO TRADING CO LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**UNITY GROUP KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**SGS KENYA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the ruling and order of Honourable M.W. Murage, SRM delivered on 26th February, 2019 in Milimani CMCC No. 769 of 2019)*

**JUDGMENT**

1. This appeal emanates from the ruling delivered on February 26, 2019 in Milimani CMCC No 769 of 2019. The background facts are that Yiwu Raoao Trading Co Limited and Unity Group Kenya Limited (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) lodged the suit by way of the plaint dated February 11, 2019. Seeking a permanent injunction, general damages, and costs against Kenya Bureau of Standards (hereafter the Appellant) and SGS Kenya Limited (hereafter the 3<sup>rd</sup> Respondent) for alleged loss and damage resulting from detainment of certain goods which were being imported from China into Kenya at the material time.
2. The plaint was accompanied by the Notice of Motion filed on February 12, 2019 (the application) supported by the grounds laid out on its body and the depositions in the affidavit of Philip Kimani, Managing Director of the 1<sup>st</sup> Respondent. Therein, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sought for interim injunctive and declaratory orders against the Appellant and the 3<sup>rd</sup> Respondent in respect of the



Consignment No 62237 Ref No 40990xxxxx CR No UCR 2018013711xxxxx (the material goods) pending the hearing and determination of the suit.

3. The 3<sup>rd</sup> Respondent filed a statement of defence on April 4, 2019 denying the key averments in the plaint and liability. Subsequently, the Appellant on its part filed the notice of preliminary objection dated February 20, 2019 challenging the competency of the application on the grounds that the lower court lacked jurisdiction to determine the suit since the acts complained of fell within the jurisdiction of the Standards Tribunal (hereafter the Tribunal) established under Section 16A of the [Standards Act](#).
4. Upon hearing the application, the trial court purported to expunge the preliminary objection from the record for want of prosecution and non-attendance while partially allowing the application. Thus, provoking the instant appeal which was brought via the memorandum of appeal dated March 4, 2019 and is based on the following grounds:
  - “1. The Learned Trial Magistrate erred in law by conferring herself jurisdiction which she did not have.
  2. The Learned Trial Magistrate misdirected herself in totally disregarding the Appellant’s Notice of Preliminary Objection on jurisdiction dated February 20, 2019.
  3. The Learned Magistrate erred in law by failing to invoke her inherent jurisdiction to *suo moto* decide on whether or not it had jurisdiction to entertain the Application dated February 12, 2019.
  4. The Learned Trial Magistrate erred in law and fact in finding in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.” (sic)
5. Directions were given for the appeal to be canvassed by way of written submissions. However, the record shows that the Respondents did not participate at the hearing of the appeal or file any documents in that respect, despite service. On its part, the Appellant’s counsel anchored his submissions on the renowned case of [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd \[1989\] eKLR](#) to argue that the trial court erred by conferring upon itself jurisdiction which it did not have and by further failing to determine the question whether it had jurisdiction to consider the application. Counsel relied on the decision in [Joseph Njuguna Mwaura & 2 others v Republic \[2013\] eKLR](#).
6. Counsel also cited the decisions in [Kenya National Chamber of Commerce and Industry & 2 others v Kenya Bureau of Standards & another \[2017\] eKLR](#); [Speaker of the National Assembly v Njenga Karume \(2008\) IKLR \(EP\)](#); and [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others \[2012\] eKLR](#). To support the assertion that a court derives its jurisdiction either from the [Constitution](#) or legislation or both, and that where the law provides for a clear procedure for redress of a grievance, such procedure must be strictly followed, citing section 16G of the [Standards Act](#) to assert that the lower court lacked jurisdiction to entertain the application and suit.
7. It was also further submitted that the trial court erred by granting a mandatory injunction at the interim stage and the obtaining circumstances did not warrant the issuance of such an order. Here, counsel cited the case of [Stephen Kipkebut t/a Riverside Lodge and Rooms v Naftali Ogola \[2009\] eKLR](#). The court was therefore urged to allow the appeal and upon doing so, to strike out the application with costs.



8. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co Ltd and Others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.
9. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
10. To be determined in the present appeal is the key question whether the trial court acted correctly by disregarding the preliminary objection and if so, whether the trial court acted correctly by granting the mandatory injunctive sought in the application. The court will therefore address the four (4) grounds of appeal contemporaneously under the following limbs.
11. The first limb of the appeal relates to the correctness of the trial court’s disregarding of the preliminary objection. In the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 the court defined a preliminary objection in the following manner:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
12. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
13. As earlier stated, upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filing the application, the Appellant lodged the preliminary objection challenging the jurisdiction of the trial court to entertain the suit and sought to have the application struck out under Section 16A of the *Standards Act* Cap. 496 Laws of Kenya (the Act) which prescribes the jurisdiction of the Tribunal. The record shows that when the application came up for interparties hearing, counsel for the 3<sup>rd</sup> Respondent indicated that he would not be opposing the application. However, counsel for the Appellant was not present in court and the trial court, purported to expunge it and proceeded to hear the application.
14. Evidently, the Appellant did not argue the preliminary objection but expunging it before considering the pertinent challenge to the jurisdiction appears remarkable on the part of the lower court. Beside the fact that the expunging of the objection appears a novel way of dealing with an objection for want of prosecution, the legal principle is that jurisdiction is everything and without it, a court cannot perform any further action in a matter.



15. This position was reaffirmed by the Court of Appeal in [\*Phoenix of EA Assurance Company Limited v SM 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 complaint 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.”

16. On that basis alone, the court is of the view that the trial court ought to have proceeded to consider the preliminary objection even in the absence of the Appellant and therefore erred in expunging it from the record.
17. The preliminary objection cited the provisions of Section 16A of the Act which provides in part that:
  - “(1) The Standards Tribunal is hereby established.
  - (2) The Tribunal shall consist of a Chairman and four other members, appointed by the Minister.”
18. According to Section 16D:
  - “(1) If a matter appears to involve a point of law or to be of unusual importance or complexity the Director may refer the matter to the Tribunal for a general direction.
  - (2) The Director shall give notice of the reference to any party to the matter and that party shall be entitled to be heard by the Tribunal.
  - (3) The Bureau and the Director shall be bound by the directions of the Tribunal on the reference, subject to any appeal to the High Court.”
19. Section 16G states :

“A party to proceedings before the Tribunal may appeal the decision of the Tribunal to the High Court.”
20. Further to the foregoing, the court considered other relevant provisions under the Act, such as Section 4 which lists the functions of the Appellant as follows:
  - “(1) The functions of the Bureau shall be—
    - (a) to promote standardization in industry and commerce;
    - (b) to make arrangements or provide facilities for the testing and calibration of precision instruments, gauges and scientific apparatus, for the determination of their degree of accuracy by comparison with standards approved by the Minister on the recommendation of the Council, and for the issue of certificates in regard thereto;
    - (c) to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated;
    - (d) to control, in accordance with the provisions of this Act, the use of standardization marks and distinctive marks;



- (e) to prepare, frame, modify or amend specifications and codes of practice;
- (f) to encourage or undertake educational work in connexion with standardization;
- (g) to assist the Government or any local authority or other public body or any other person in the preparation and framing of any specifications or codes of practice;
- (h) to provide for co-operation with the Government or the representatives of any industry or with any local authority or other public body or any other person, with a view to securing the adoption and practical application of standards;
- (i) to provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of this Act or any other law dealing with standards of quality or description.”

21. Section 11 stipulates that:

“Any person who is aggrieved by a decision of the Bureau ... may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal.”

22. It is apparent from the foregoing provisions that clear-cut procedures are provided for recourse by a party aggrieved by the decision or action of the Appellant. The undisputed legal principle being that where mechanisms have been put in place for resolution of grievances by parties, they ought to be exhausted first before court action is initiated. In the present instance, it appears that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were aggrieved by the actions taken by the Appellant in detaining the material goods. The said Respondents ought to have followed the stipulated procedure for seeking recourse by lodging a complaint in the appropriate forum. The Act does not cloth the subordinate court with jurisdiction to entertain a dispute of the nature presented before it.

23. In the result, the court is satisfied that that the trial court lacked jurisdiction and that the suit and application were filed before the wrong forum. The trial court ought to have determined the objection first and downed its tools at the earliest opportunity possible. In failing to do so, the trial court proceeded to determine a matter in respect of which it did not have jurisdiction.

24. The appeal is allowed, and the ruling delivered by the trial court on February 26, 2019 is hereby set aside. The court substitutes therefor an to the effect that the suit in the lower court and accompanying notice of motion dated 12<sup>th</sup> February, 2019 are hereby struck out with costs to the Appellant. The Appellant shall also have the costs of the appeal. The costs are to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF AUGUST 2023.**

**C.MEOLI**

**JUDGE**



**In the presence of:**

For the Appellant: Mr. Kipsigei h/b for Mr. Ligari

For the Respondent: N/A

C/A: Emily

