



Melamani/Meladen Limited v Ukamba Agricultural Institute Limited (Environment and Land Miscellaneous Application E034 of 2023) [2023] KEELC 18397 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18397 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E034 OF 2023**

**AA OMOLLO, J
JUNE 29, 2023**

BETWEEN

MELAMANI/MELADEN LIMITED APPLICANT

AND

UKAMBA AGRICULTURAL INSTITUTE LIMITED RESPONDENT

RULING

1. The Applicant filed a notice of motion dated January 31, 2023 under the provisions of section 1A, 1B, 18, 63e and 89 of the [Civil Procedure Act](#) seeking for the following orders;
 1. Spent;
 2. Spent;
 3. Spent;
 4. That this Honourable Court be pleased to issue an order for withdrawal of suit number Milimani Chief Magistrate Court Civil Suit No 5353 of 2019 from the lower court and transfer the matter to this court for hearing and determination.
 5. That the cost of this application be in cause.
 6. Any other orders that this court may be deem fit to issue.
2. The motion is supported by the affidavit of Pamela Akinyi Olet sworn on January 31, 2023 stating that the Applicant entered into a land sale agreement dated February 16, 2011 with the Defendant/ Respondent to sell land parcel number Nairobi/209/10350 measuring 0.8 acres (herein after referred to as “the suit property”) for a sum of Kenya Shillings Sixty Million (Kshs 60 Million). That there were irreparable disagreements which made the Applicant invoke the clause to rescind the agreement but the Respondent did not agree.



3. The Applicant deposed that his Advocate erroneously filed a plaint seeking a permanent injunction restraining the Defendant/Respondent from evicting and or interfering in any manner whatsoever with the Plaintiff's/Applicant's quiet possession and peaceful enjoyment of the suit property at the Chief Magistrate's Court at Milimani in Nairobi CMCC No 5353 of 2019; Melamani/Meladen Limited vs Ukamba Agricultural Institute Limited which has become an inappropriate forum on account of the pecuniary jurisdiction.
4. The Applicant stated that the proceedings in the Chief Magistrates are ongoing despite the court being aware of its lack of jurisdiction and that the matter is set for hearing, the court having heard an application on November 25, 2019 and given permanent injunction orders.
5. The Applicant averred that the Respondent has filed a preliminary objection dated November 22, 2022 to have the suit before the Magistrate's court struck out which would be prejudicial to the Plaintiff/Applicant. It is their contention that the lower court is devoid of jurisdiction and it cannot transfer the suit to the ELC on account that it is filed in a court without pecuniary power to entertain it hence the need to have the suit transferred. That the Respondent stands to suffer no prejudice.
6. The Respondent opposed the application vide replying affidavit sworn by Eric Mutinda Mutisya on February 24, 2023. Mr Mutisya deposed that the contract was frustrated by factors beyond the parties' control as the relevant authorities declined to issue the consents to sub divide because several cases were filed that restricted any dealings with the suit property. He stated that they attempted to refund the deposit paid by the Plaintiff/Applicant and put a closure to the said transaction. Instead, the Applicant on July 19, 2019 vide plaint dated the same day, together with an application for injunction moved to the lower court for orders of injunction, noting that the same were filed by Pamela Akinyi Olet as a Plaintiff's Director who signed and filed the Plaint.
7. The Respondent contended further that the Applicant continues to enjoy the interim orders that were granted on November 25, 2019 albeit mistakenly as the same were never extended by court after 12 months as required by the law and that since then, the Applicant took no steps to prosecute the case. Mr Mutisya deposed that on April 26, 2022 the Respondent moved the court and on May 25, 2022 was given with the court directing that the matter should be fixed for hearing within 45 days.
8. The Respondent further deposed that after the court gave the directions on hearing, the court file went missing and after several letters that went unanswered were written, it resurfaced. That their advocate advised them that the value of the suit property was way beyond the jurisdiction of the magistrates' court and thus a preliminary objection was raised on December 8, 2022. He added that on eve of the mention date to confirm filing of submissions on the preliminary objection, the Applicant served them with a replying affidavit to the PO and this miscellaneous application. That there being no objection as to the lower court lacking jurisdiction to hear and determine the matter, the Applicant should withdraw the same and then refile it in this court.

Submissions

9. The Applicant filed submissions dated March 13, 2023 and supplementary submissions dated March 15, 2023 while the Respondent filed submissions dated February 24, 2023. The Applicant submitted the issues for determination to wit; whether he has made out a case for transfer of Milimani Chief Magistrate's Court Civil Suit No 5353 of 2019 to this Honourable court;
 - ii. power to transfer files, Jurisdiction of the Magistrate's Court,
 - iii. Circumstances under which the court can order transfer of file and



- iv. who should bear the costs of this application.
10. The Applicant submitted that a subordinate court cannot make an order of transfer of a case but this court is vested with general jurisdiction to transfer suits from one court to another under section 18 of the *Civil Procedure Act*. It cited the case of *Rapid Kate Services Limited v Freight Forwarders Kenya Limited & 2 others* [2005] 1 KLR 292, where the court expressed itself that the court's power to transfer from one court to another is discretionary and is a useful corrective measure to ensure that proceedings wherever began or whatever forum the plaintiff has initially chosen should be dealt with or heard or determined by the court most appropriate.
11. He added that the proceedings erroneously filed in the lower court warrants this Court to invoke its discretionary powers as the lower court's pecuniary jurisdiction is Kshs 20,000,000/. In support of its case, the Applicant cited the case of *Phoenix of EA Assurance Company Ltd v SM Thiga t/a Newspaper Service* [2019] eKLR, where the High Court had transferred a suit filed in the Principal Magistrate's Court to the High Court for trial and disposal on account of inadequate pecuniary jurisdiction on the part of the Magistrate's court and in appeal judgment by the Court of Appeal held inter alia that;
- “We are not persuaded that the proposition by the respondent is correct in law. 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.”
12. The Applicant further submitted that in regard to section 1B (1) (d) of the *Civil Procedure Act* which puts this Court under duty to ensure affordability of the court process thereforeshould not condemn the Plaintiff/Applicant to pay double the fees by filing this suit afresh when it has the discretionary power to transfer the same to it for trial and disposal and ensure that that the overriding objectives of the court are met. In support of this argument, it cited by the Court of Appeal case of *Phillip Chemwolo & another v Augustine Kubende* [1986] eKLR, where Apaloo JA recognized inter alia that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit and that the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. That the court as is often said to exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.
13. The Applicant submitted that as it can be seen on the face of the Plaintiff/Applicant's pleadings, the same were drawn to be filed in the Nairobi High Court Registry as the Plaintiff read; Republic of Kenya in the High Court of Kenya at Nairobi Milimani Law Courts Civil Case No of 2019, but due to the Plaintiff/Applicant's being a layman in judicial processes and registry stations, inadvertently and erroneously took the file to the Chief Magistrate's Court registry. The Applicant relied on the case of *Kitbita Ngeana v Mwaniki Kisuma* [2018] eKLR which analyzed the circumstances that would have a court grant the order sought were considered. They reiterated the David Kabungu case where Okello J stated that, what the court has to consider is whether the Applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the Plaintiff and leaving him seek his remedy in another jurisdiction. It is a well-established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted.



14. The Respondent laid out the facts of the case and submitted that the transfer of suit from one court to another is guided by Order 18(1)(b) of the Civil Procedure Rules as well as Sections 1A, 1B & 3A of the Civil Procedure Act. That there are basic considerations for the grant of such transfer citing the case of Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & ANo (2012) Eklr which quoted the case of Kagenyi v Musiramo & Ano (1968) EA where the court held that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction
15. The Respondent also the case of Boniface Waweru Mbiyu v Mary Njeri & Ano where the court held that whenever a matter is filed before a court lacking jurisdiction, the professional error there committed is fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client....and it follows that such matter has no capacity to be transferred to any other court.

Analysis

16. The main issue for determination in this matter is whether this court should transfer Civil Suit No 5353 of 2019 filed in the Chief Magistrates' Court.
17. It is not contested that the lower court does not have the jurisdiction to hear and determine the said case filed as Nairobi Chief Magistrate Court Civil Suit No 5353 of 2019. As was appositely stated in the Owners of Motor Vessel "Lilian s" v Caltex Oil (K) Ltd [1989] KLR 1, it would be inconsequential for a Court of law to hear and determine a matter if it lacks the jurisdiction to do so. The Court of Appeal made this point thus:

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. The pecuniary jurisdiction of a Chief Magistrate's jurisdiction is spelt out in Article 169 of the Constitution and Section 7(1) of the Magistrates' Courts Act. Section 7(1) of the Magistrates' Courts Act 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;

19. It is plain therefore Chief Magistrates' court, had no jurisdiction to handle the claim as presented in Civil Suit No 5353 of 2019. This application for transfer has been brought under Section 18(1) of the Civil Procedure Act which provides thus in subsection (1)(b) thereof:

“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...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.”

19. The foregoing provision presupposes that the suit was filed in a Court with the jurisdiction to try and dispose of it. In the instant case, it is indubitable that the suit was filed before a court that had no pecuniary jurisdiction to entertain it. And, whether such a suit can competently be transferred, at the instance of the Higher Court, Environment and Land Court, to a court of competent jurisdiction, has been the subject of numerous decisions in the Court of Appeal. For instance, in [Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service](#) [2019] eKLR, the Court of Appeal held that:

“...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. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. “

20. The same position was taken by the Court of Appeal in [Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel](#) (2016) eKLR thus:

“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.”

21. In the premises, it is plain that Milimani Chief Magistrate Court Civil Suit No 5353 of 2019 is incompetent and incapable of transfer to this court. The suit and all the orders made therein are, in fact, null and void, having been made without jurisdiction. In [Macfoy v United Africa Co Ltd](#) [1961] 3 All ER, 1169 it was aptly 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 more 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...”

22. Therefore, the application herein is untenable and it is dismissed with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE, 2023



A. OMOLLO
JUDGE

