



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 269 OF 2019

ZACHARIA MUTUKU KIVIU (*suing as father and administrator*)

of the estate of MICHAEL MUTUA MUTUKU (Deceased).....RESPONDENT/PLAINTIFF

VERSUS

MOPAK COMPANY LIMITED.....APPLICANT/DEFENDANT

RULING

1. A notice of preliminary objection (P.O.) dated 19th November 2020 was filed by the defendant/applicant herein through Mukele, Ngacho & Co. advocates. The P.O. is premised on the following grounds:

(i) This is not the appropriate judicial forum to handle this dispute by dint of section 11 of the Civil Procedure Act chapter 21 Laws of Kenya as read with Section 7 of the Magistrates Court Act number 26 of 2015.

(ii) The plaintiff has wrongly invoked the jurisdiction of this honourable court.

(iii) The defendant's right to a fair hearing that encompasses the right to approach this honourable as the first appellate court in the first instance will be violated and infringed upon if this honourable court were to assume jurisdiction in this matter.

2. It was disposed off by written submissions. Mr. Ngome in his submissions dated 8th April 2021 has referred to Article 25(c) of the Constitution, section 11 of the Civil Procedure Act and section 7 of the Magistrates' Courts Act which sets out the pecuniary jurisdiction of the various magistrates courts. In his submission that this suit should have been filed in the magistrates court which has jurisdiction.

3. He has referred to the case of **Samuel Kamau Macharia & anor vs Kenya Commercial Bank Ltd & 2 others [2012] eKLR** where it was held as follows:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

4. He has also referred to the case of **Selina Vukinu Ambe v Ketan Shashikant Khatri [2020] eKLR** where it was stated:

"I have studied the pleadings in this case and as noted earlier, the plaintiff's claim is premised on the tort of defamation. Given the words or statements contained in the alleged defamatory posts and the forum in which they were allegedly published, I agree with the defendant's submission that even if the plaintiff were to succeed in her suit, it is highly unlikely that she would be awarded damages exceeding KShs.20,000,000 which is the pecuniary jurisdiction of the lower court."

5. Relying on the stated cases he contends that there is nothing on record to show that the plaintiff would be awarded more than Kshs 20,000,000/=. Counsel submits that once this court makes a finding that it lacks jurisdiction to handle this matter then it should down its tools as was held in **Phoenix of E. A. Assurance Co. Ltd vs. S. M. Thiga t/a Newspaper Service [2019] eKLR**.

6. Its his submission that the filing of a suit in a court without jurisdiction cannot be remedied by the provisions of Article 159(2)(d) of the Constitution as issues of jurisdiction are not procedural technicalities. He contends that if this court hears the matter the defendant will be denied an opportunity to approach this court as the first appellate court.

7. Mr. Mukami for the plaintiff/respondent filed submissions dated 14th April 2021 opposing the preliminary objection on two fronts namely:

(i) *This court has unlimited original jurisdiction in criminal and civil matters under Article 165 (3) of the Constitution.*

(ii) *The plaintiff's claim is not among those matters excluded from the jurisdiction of this court by the provisions of Article 165 clause (5) of the said constitution.*

8. Its his submission that the P.O. is incompetent and does not fit within the threshold of what constitutes a P.O. as held in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] E.A. 696** where it was stated:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

And further, that “... 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 if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses the issues. This improper practice should stop.”

9. Counsel submits that the expected award is over Kshs 20,000,000/= which is not within the jurisdiction of the chief magistrate. The reason behind this, is that the deceased was a university student aged 24 years and who enjoyed good health. He refers to the case of **Steve Tito Mwasya & anor. (both suing as legal representatives of the estate of SKT (deceased) v Rosemary Mwasya [2015] eKLR** where the deceased was aged 19 years and the estate was awarded Kshs 14,227,680/=.

10. Its his submission that the plaintiff/applicant will have a right to move to the Court of Appeal in case he is dissatisfied with the decree of this court. He however while relying on section 18(1) of the Civil Procedure Act submitted that this court can transfer the matter to the Chief Magistrate's court. The said section provides:

“(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.”

11. He urged the court to transfer the case to the Magistrate's court in the unlikely event that the P.O. succeeds.

Analysis and determination

12. I have considered the P. O. and the submissions by both counsel together with the law and authorities referred to. The issue for determination is whether this court has jurisdiction to hear and determine this case. The claim in this case is unliquidated. The plaintiff appears to have very high expectations of the award to receive in the case if successful.

13. **Section 11** of the **Civil Procedure Act** provides:

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that—

(i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and

(ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district.

14. Section 18(1) Civil Procedure Act provides:

(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;”

15. I have considered all the above provisions of the law and the pleadings herein. The defence filed has not raised anything about the jurisdiction of this court in hearing and determining this case.

16. The high court has unlimited original jurisdiction in both criminal and civil matters by dint of Article 165(3) of the Constitution. Good practice and the law in Section 11 of the Civil Procedure Act dictates that a suit should be filed in the court of the lowest grade competent to try it. This gives the dissatisfied party a longer trail in terms of appeal. So it cannot be claimed that this court lacks the jurisdiction to hear and determine this matter as stated in the P. O.

17. From the pleadings in the plaint I am satisfied that the Magistrate’s court can comfortably try and determine this case.

18. I therefore transfer this suit to the Chief Magistrate’s commercial court for hearing and determination. The matter be mentioned before the Chief Magistrate (*incharge*) on 16th July 2021 for allocation and further directions.

Costs will be in the cause.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF JUNE 2021 AT NAIROBI.

H. I. ONG’UDI

JUDGE