



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC.CIVIL APPLICATION NO. E129 OF 2021

FAMILY BANK LIMITED.....APPLICANT

-VERSUS-

SHEMSA NASSORO HAMDU.....RESPONDENT

RULING

[1] This ruling is in respect of the Notice of Motion dated **24 May 2021**. It was filed by **Family Bank Limited** (hereinafter, “the applicant”) pursuant to **Sections 1A, 1B, 3A, 18(1)(b) and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for the following orders:

[a] That the Court do certify the application as urgent and that the same be heard *ex parte* in the first instance. (spent)

[b] That **Civil Suit No. 146 of 2020: Family Bank Limited vs. Shemsu Nassoro Hamdu** be withdrawn from the Magistrate’s Court in Kwale and transferred to the Chief Magistrate’s Court in Mombasa for hearing and determination.

[c] That the interim orders issued on **18 January 2021** be set aside.

[d] That the costs of the application be in the cause.

[2] The application was premised on the grounds that the amount demanded by the applicant is **Kshs. 17,484,119.36** and the Kwale Magistrate’s Court as currently constituted lacks the pecuniary jurisdiction to hear and determine this suit as it is headed by a Senior Principal Magistrate, whose pecuniary jurisdiction is limited to **Kshs. 15,000,000**. It was therefore the assertion of the applicant that the Senior Principal Magistrate at Kwale lacks the requisite pecuniary jurisdiction to hear and determine the matter; and therefore that he extended the interim orders of **18 January 2021** without jurisdiction.

[3] The applicant relied on the Supporting Affidavit sworn on **24 May 2021** by its Advocate, **Ms. Ivy Ngui**, in which the aforementioned grounds were explicated. The applicant also annexed a copy of an Order issued on **12 May 2021** by **Hon. Wambugu**, Principal Magistrate, by which the applicant was “...directed to apply to the High Court for a transfer to a court that has Pecuniary Jurisdiction.” The lower court also extended the interim orders “...until the Court with Jurisdiction takes over”.

[4] The respondent opposed the application and had Grounds of Opposition filed on her behalf by **M/s Sethna Atonga & Company Advocates** on **2 June 2021**. The respondent’s stance is that the application is grossly misconceived, bad in law, incompetent and fatally defective in so far as it seeks to set aside a valid, lawful and substantive court orders through a Miscellaneous Application. It was further the contention of the respondent that the applicant is engaging in forum shopping, while fully aware that there is a similar matter involving the parties; being **Mombasa High Court Civil Case No. 46 of 2020** in which stay orders have been made, which bind the subordinate court. The respondent also raised the ground that once a mortgagee exercises its right to sue, it cannot exercise its statutory power of sale; and therefore that the application dated **24 May 2021**, being unfounded and ill-advised, should be dismissed with costs to the respondent.

[5] In addition to the Grounds of Opposition, the respondent relied on her own affidavit, sworn on **18 June 2021**. She averred that, whereas she is not opposed to the transfer of the subject suit from Kwale to Mombasa Chief Magistrate’s Court, the instant application is untenable as it has been brought in bad faith, in so far as it seeks the setting aside of orders made in a substantive suit. The respondent further averred that the process adopted by the applicant is designed for the specific purpose of stealing a march on her and to deny her a strong defence to the main suit. In particular, the respondent is apprehensive that, once the interim orders are set aside, the applicant will proceed to sell her property known as **Kwale/Shimoni Adj. 461**, which it advertised for sale on **5 January 2021**.

[6] The respondent also disclosed that the applicant sued her husband, Yusuf Hassan, in **Mombasa High Court Civil Suit No. 46 of 2020: Family Bank vs. Yusuf Hassan Mubwana** in which **Hon. Njoki Mwangi, J.** issued interim orders on **19 January 2021**. She pointed out that the orders were granted to restrain the applicant from disposing of the subject property pending hearing and determination of her husband's application for injunction; and that those orders are still subsisting, having been extended from time to time. She accordingly asserted that it would be harsh and unfair to punish her, an innocent litigant, for the administrative reorganizational decisions made by the Judiciary; which is what she fears would happen should the interim orders be set aside.

[7] The application was canvassed by way of written submissions pursuant to the directions of the Court dated **3 June 2021**. In his written submissions filed on **28 June 2021**, **Ms. Ngui** for the applicant proposed only two issues for determination; the first of which is whether **Kwale Civil Suit No. 146 of 2020** should be transferred to the Chief Magistrate's Court in Mombasa for hearing and determination. The second issue proposed by **Ms. Ngui** is the question whether the orders of **18 January 2021** should be set aside for having been made without jurisdiction.

[8] In respect of the first issue, **Ms. Ngui** urged the Court to note that the respondent is not opposed to transfer, and that this was explicitly indicated at paragraph 3 of her Replying Affidavit. It was therefore on that account that counsel urged the Court to accede to the proposed transfer and make orders accordingly. As to whether the orders of **12 May 2021** were made without jurisdiction, counsel made reference to **Section 7 of the Magistrates Courts Act, No. 26 of 2015**, which specifies the pecuniary jurisdiction of a Chief Magistrate to be **Kshs. 20,000,000/=**. In her argument, since Kwale is classified as a Chief Magistrate's Court, there ought to have been a Chief Magistrate on hand to handle matters that would fall under the exclusive jurisdiction of a Chief Magistrate. In her view, that there is no Chief Magistrate at Kwale Law Courts presently, is no fault of the applicant. Counsel also pointed out that the instant application was necessitated by a specific order by **Hon. Wambugu**, dated **12 May 2021**; given the reality that he did not have the requisite jurisdiction to entertain the suit.

[9] Accordingly, it was the argument of **Ms. Ngui** that, having conceded that he had no jurisdiction to entertain the suit, it was not open to **Hon. Wambugu** to extend the interim orders. She stressed that jurisdiction either exists or it does not; and that where there is no jurisdiction, a court of law ought to down its tools, based on the principle that *ex nihilo nihil fit*. Counsel also cited **Kenya Ports Authority vs. Modern Holdings [EA] Limited** [2017] eKLR for the proposition that the issue of jurisdiction can be raised by the court *suo motu*; and therefore that the applicant did not have to specifically raise it with the lower court. It was consequently the submission of **Ms. Ngui** that the orders of **12 May 2021**, by which the interim orders of **18 January 2021** were extended, are null and void. She added that, in any event the auction that was advertised on **5 January 2021 for Wednesday, 20 January 2021** at 11.00 a.m. has since been overtaken by events; and therefore that an order for stay would be superfluous in the circumstances.

[10] On behalf of the respondent, learned counsel, **Mr. Atonga**, relied on his written submissions dated **12 October 2021**. He reiterated the respondent's assertion that she is not opposed to the lower court file, being **Kwale Civil Suit No. 146 of 2020**, being transferred to the Chief Magistrate's Court at Mombasa for hearing and determination. He however underscored the fact that the respondent is opposed to the prayer for setting aside of the existing interim orders. In his submission, to vacate the orders would be tantamount to validating the irregular advertisement and intended sale of the respondent's property.

[11] In **Mr. Atonga's** submission, it is not open, under **Section 90(3) of the Land Act, 2012**, for the applicant to file a suit and at the same time also activate its statutory power of sale. Counsel relied on **Dinesh Kumar Zaverchand Jetha vs. Guaranty Trust Bank Kenya Limited** [2017] eKLR and **Kajiado High Court Civil Case No. 25 of 2018: David Karanja vs. Harrison Wambugu Gaita & Kenya Commercial Bank Ltd** in support of his argument. He therefore posited that to vacate the interim orders granted by the lower court would be to deny the respondent a strong, valid and lawful defence to the main suit which is presently available to her.

[12] Lastly, **Mr. Atonga** submitted that a court of law can never be hapless in the face of an injustice, illegality or an apparent infringement of a party's right; and that, had the interim orders not been extended, the applicant would have illegally sold the respondent's property in disregard of the provisions of **Section 90(3) of the Land Act**. Counsel relied not only on **Sections 1A and 1B of the Civil Procedure Act**, but also the definition of the term inherent powers as explained by the authors of **Halsbury's Laws of England, 4th Edition, Vol. 37 Para. 14**. He also cited **Kenya Power & Lighting Company vs. Njumbi Residents Association & Another** [2015] eKLR to buttress his arguments. He consequently prayed for the dismissal of prayer 3 of the applicant's Notice of Motion dated **24 May 2021** with costs to the respondent.

[13] From the foregoing, there is no dispute that the applicant filed **Kwale Chief Magistrate's Civil Case No. 146 of 2020 (the Kwale suit)** against the respondent seeking to recover monies due to it on account of a facility advanced to the respondent in **2015**. A copy of the Plaintiff filed in that case was exhibited herein as **Annexure SNH2** to the respondent's Replying Affidavit. The parties are also in agreement that, as security for the facility, the respondent offered her title for the piece of land known as **LR No. Kwale/Shimoni Adj/461**; which was said to have a forced sale value of **Kshs. 15,000,000/=** at the time. It was upon default by the respondent in servicing the facility that the applicant opted to file the Kwale suit for breach of contract. It appears, from the documents exhibited that by the time the aforementioned suit was filed, the applicant was already in the process of pursuing its statutory power of sale, with a view of realizing the security.

[14] The respondent consequently filed an application under Certificate of Urgency in the Kwale suit dated **15 January 2020** in which she prayed for a temporary injunction to restrain the applicant from selling the charged property pending the hearing and determination of the application and thereafter the suit itself. **Annexure SNH4B** shows that **Hon. Wambugu**, Principal Magistrate, allowed the application for interim orders on **18 January 2021** pending the hearing and determination of the application *inter partes*. The order was thereafter extended severally until the **12 May 2021** when **Hon. Wambugu** directed the parties to apply to the High Court for transfer of the suit to a court that has the pecuniary jurisdiction to entertain it.

[15] Counsel for the respondent made heavy weather of the fact that there is a suit pending before Mombasa High Court; being **Civil Case No. 46 of 2020** (hereinafter, the Mombasa suit), and surmised that the applicant was out forum shopping by filing the Kwale suit. However, having perused the documents placed on the file, I find that assertion unwarranted. The Plaintiff in respect of the Mombasa Suit reveals that the applicant sought to recover a larger sum of **Kshs. 48,795,347/44**, not from the respondent herein, but from one **Yusuf Hassan Mubwana**, who, admittedly is the husband of the respondent. The respective Plaintiffs further show that the suits were premised on separate lending contracts under entirely disparate terms.

[16] Hence, although the respondent and her counsel insisted that the same security in the Kwale suit is the subject of the Mombasa suit, nothing could be further from the truth; for, at paragraphs 5 and 26 of the Plaint filed in the Mombasa suit, the security offered was the title for **LR No. Kwale/Vanga/23** and **Kwale/Shimoni/671**, in the name of **Yusuf Hassan Mubwana**. Subsequent restructuring and enhancement of the facility saw **Yusuf Hassan Mubwana** offer additional security in the form of original title for **LR No. Kwale/Shimoni Adj./590**. It appears therefore that **Kwale/Shimoni Adj./461** that is the subject of the Kwale suit is not in issue in the Mombasa suit.

[17] From the parties' averments and their written submissions, issues were raised and canvassed which belong to the substantive suits. For instance, parties raised the question as to whether, under **Section 90(3)** of the **Land Act**, it is permissible for the applicant to file a suit while at the same time asserting its statutory power of sale. In my view, those are not matters that properly fall for determination in this Miscellaneous Application and I have consequently declined the invitation to make a determination thereon. Hence, the only issue for determination is the question whether the application for transfer and the prayer for extension of the interim orders issued on **18 January 2021** are tenable.

[18] As was appositely stated in the **Owners of Motor Vessel "Lilian s" vs. 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."

[19] In the **Major Law Lexicon, Volume 4**, jurisdiction is defined thus:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."

[20] Accordingly, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the Supreme Court held that:

"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 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... 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 on 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."

[21] The place and pecuniary jurisdiction of a Senior Principal 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;**
- (b) Fifteen million shillings, where the court is presided over by a senior principal magistrate;**
- (c) Ten million shillings, where the court is presided over by a principal magistrate;**
- (d) Seven million shillings, where the court is presided over by senior principal magistrate; or**
- (e) Five million shillings, where the court is presided over by a resident magistrate.**

[22] It is plain therefore that **Mr. Wambugu**, a Senior Principal Magistrate, had no jurisdiction to handle the claim as presented in **Kwale Chief Magistrate's Civil Case No. 146 of 2020**; and it matters not that the administrative station known as Kwale Law Courts had been upgraded to the status of a Chief Magistrate's Court before the subject suit was filed. It is understandable then that the learned magistrate took the initiative, *suo motu*, to divest himself of the conduct of the suit for lack of jurisdiction. He proceeded to direct the parties to take steps and seek the intervention of the High Court to have the suit transferred to another court with jurisdiction to entertain it.

[23] Thus, the 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.”

[24] 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 High Court, to a court of competent jurisdiction, has been the subject of numerous decisions of the Court of Appeal. For instance, in **Phoenix of E.A. Assurance Company Limited vs. S. M. 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. “

[25] The same position was taken by the Court of Appeal in **Equity Bank Limited vs. 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.”

[26] In the premises, it is plain that **Kwale Chief Magistrate’s Civil Case No. 146 of 2020** is incompetent and incapable of transfer to the Chief Magistrate’s Court at Mombasa. The suit and all the orders made therein, including the interim orders of **18 January 2021**, as well as the subsequent order by **Hon. Wambugu** dated **12 May 2021** are, in fact, null and void, having been made without jurisdiction. As was aptly stated in **Macfoy vs. United Africa Co. Ltd.** [1961] 3 All ER, 1169:

“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...”

[27] In the result, the application dated **24 May 2021** is untenable. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF NOVEMBER 2021

OLGA SEWE

JUDGE