



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC APPL. NO. 378 OF 2019**

**CREST SECURITY SERVICES LTD .....APPLICANT**

**VERSUS**

**MULTIPLE ICD KENYA LIMITED.....RESPONDENT**

**RULING**

**The Application**

1. The Applicant filed a Notice of Motion dated 23<sup>rd</sup> May, 2019 seeking in the main that the **Honourable Court be pleased to withdraw and transfer Mombasa CMCC No. 5554 of 2019 CREST, SECURITY SERVICES LTD –VS- MULTIPLE ICD KENYA LIMITED** from the **Chief Magistrate’s Court** at Mombasa to the **High Court at Mombasa**.
2. The grounds of the application are disclosed on the face of the Notice of Motion as well as the Supporting Affidavit sworn by **PATRICK NGAINE** on 1<sup>st</sup> October, 2019. In the two documents it is averred that the suit seeks to recover a debt of Kshs. 26, 802, 466.02 plus interests and costs which sum the Chief Magistrate’s Court lacks Pecuniary Jurisdiction to hear or determine. It is further averred that the Applicant inadvertently filed this case at the lower court instead of the High Court and that the mistake ought not to be visited upon the Applicant.
3. The Applicant also discloses that the Respondent had filed a Notice of Preliminary Objection before the trial court and that it is likely that it will be upheld and consequently strike out the suit. That by allowing this application it will save judicial time by facilitating a timely and cost effective disposal of the suit to the benefit of all parties and if denied the Applicant herein will suffer loss and damage and forced to file a fresh suit at the High Court thereby incurring costs attendant thereto.

**The Response**

4. The Respondent opposed the application by way of Grounds of Opposition dated 9<sup>th</sup> October, 2019 and filed on 11<sup>th</sup> October, 2019. The Respondent, in the grounds, contends that this court has no jurisdiction to hear and determine the subject application on the basis that a suit filed in a court without jurisdiction is a nullity in law, incurably bad and cannot be transferred. That this court can only transfer a cause whose existence is recognized by law it being stressed that the power of the courts to transfer suits under Section 18 of the Civil Procedure Act cannot be exercised in a matter where a suit was filed before a court without jurisdiction.

**Analysis and Determination**

5. I have carefully considered the Application before this court as well as the Response thereto. The main and only issue that this Court is called upon to decide on is whether this court has jurisdiction to transfer **CMCC NO. 554 OF 2019 MOMBASA CREST SECURITY SERVICES LIMITED –VS- MULTIPLE ICD KENYA LIMITED**, said to have been filed before a court without the requisite pecuniary jurisdiction. Of course there is the ancillary and incidental issue as to who between the parties should meet the costs of this application.
6. Section 7(1) of the **Magistrates Court Act** provides that the Chief Magistrate’s court has pecuniary jurisdiction not exceeding Shs. 20 Million. That puts it beyond doubt that the suit claiming KShs. 26, 802,466.02 filed before the magistrates court is before a court without jurisdiction. With such established position, the question that remains is if a suit filed in a court devoid of jurisdiction to try it can be transferred from such a court
7. On whether the Applicant has established a case for grant of transfer of suit to the High Court, the Respondent in its response avers that a suit filed without jurisdiction is a nullity in law and therefore there is nothing to be transferred to this Court, the Respondent further avers that by virtue of **Section 18 of the Civil Procedure Act**, power to transfer suits cannot be exercised in matters filed without jurisdiction. For that position the respondent relies on the decisions of the superior courts of Kenya, largely following the decision of the High court of Uganda in

**Kagenyi vs Musiramo [1968]EA 43.** I have in mind the two decisions cited to court by the respondent being **Abraham Mwangi Wamigwi vs simon Mbiriri Wanjiku [2012] eKLR** and **wycliff mwangazaKihugwa [2014]eKLR**. This court recognises that those decisions are persuasive and fully appreciate the reasoning therein advanced. However, I would respectfully depart from the position taken on this question that keep coming up. The explanation given by the applicant is that the filing of the suit before the lower court was by inadvertence by counsel for which the party should not be penalised. The applicant also bemoans the fact that the striking out of the suit will only escalate costs in that it will be compelled to file another suit at extra costs. That to me would defeat the purpose and overriding objective of the court to administer justice efficiently, fairly and at costs that do not compromise the right to access justice.

8. This court takes the view that the concern that would militate against an order for withdrawal of a suit filed in a court without jurisdiction for trial before a court vested with jurisdiction is where a prejudice would be visited on the respondent. In the matter before me no prejudice has been alleged and I consider it in the interests of justice that an order be made for withdrawal of the matter from the magistrate's court and transfer to this court for purposes of it being heard and determined.

9. In the light of the above views, this Court is persuaded that the Mombasa Chief Magistrates courts lacks jurisdiction to determine the present matter and it shall be in the interest of substantial justice to have the same transferred to Mombasa High Court Civil Division in line with the overriding objective.

10. As regards to costs I find that the Applicant has succeeded in his application but is not entitled to costs because it was its fault to file the suit in the wrong court and it should not be allowed to benefit from own mistakes. Even though the applicant has succeeded, it shall pay the costs of the suit to the Respondent

11. The upshot therefore is that the Applicant's Application dated 1<sup>st</sup> October, 2019 is hereby allowed in terms of prayer 3 of the Notice of Motion with costs of the Respondents.

**Dated, Signed and Delivered at Mombasa this 24<sup>th</sup> day of January, 2020.**

**P.J.O. OTIENO**

**JUDGE**