



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

COMMERCIAL APPEAL NO. 007 OF 2020

(FORMERLY HCCA NO. 511 OF 2018)

BETWEEN

HOUSING FINANCE COMPANY OF KENYA LIMITED.....APPELLANT

AND

BRICK & MORTAR HOLDINGS LIMITED.....RESPONDENT

(An appeal from the order of Hon. I. Orenge SRM Made on 19/10/2018 in NRB CMCC No.9282 of 2018)

JUDGMENT

1. The appellant was the defendant in the lower court while the respondent was the plaintiff. By a plaint dated 19/10/2018, the respondent alleged that the appellant had agreed to advance the respondent facilities totalling USD 702,109 for purchase of vehicles. Pursuant thereto, the appellant advanced the respondent a total sum of **USD 702,881.11** whereby the respondent purchased five (5) new *Mercedes-Benz Actros* 3340S Prime Movers and five (5) new 3-axle flatbed Semi trailers.

2. The said vehicles were jointly registered in the names of the appellant and the respondent and served as security for the facilities advanced. The respondent was unable to make repayments as agreed under the facilities and on 17/10/2018, the appellant advertised the said vehicles for sale in the Daily Nation of the same day.

3. Pursuant thereto, on 19/10/2018 the respondent instituted **NRB CMCC No. 9282 of 2018** in the subordinate court against the appellant alleging, *inter alia*, that the latter had advertised the said vehicles for sale without justification, demand or notice and that the same was malicious. Together with the plaint, the respondent filed an application seeking injunctive and restorative orders which were granted by the trial court *ex-parte* on 19/10/2018.

4. It is against that order that the appellant lodged the present appeal setting out 7 grounds which can be summarized into two as follows: -

a) That the trial Court erred in entertaining the matter yet it had no pecuniary jurisdiction.

b) That the trial court erred in granting ex-parte orders that were final in nature that determined the suit.

5. On 9th July 2020, this Court directed the parties to file their written submissions on the appeal. As at the time of writing this judgment, only the appellant had filed its submissions but none for the respondent were found in the court file.

6. It was the appellant's submission that according to **section 7 (1) (d) of the Magistrates' Courts Act No. 26 of 2015** as read with **section 4 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, a Senior Resident Magistrate's Court has a pecuniary jurisdiction of Kshs. 7,000,000/-. That the subject matter of the suit before the trial court was Kshs. 46,130,000/- which was way beyond the pecuniary jurisdiction of the said court. The decisions in **Vijinia Wanthiga Mbiti v Nthiga M'mbanya Kivevia [2019] eKLR**, **Milkah Nanyokia Masungu v Robert Wekesa Mwembe & 2 Others [2013] eKLR** and **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**, were relied on in support of those submissions.

7. It was further submitted that the trial court erred in issuing *ex-parte* orders that were final in nature at the interlocutory stage thereby

terminating the case without affording the appellant an opportunity of being heard. The cases of **James Maina Kimemia v James Maina Kimemia & Another [2019] eKLR**, **Shepherd Homes Limited v Sandahm Homes Limited [1971] 1CH.34**, amongst others were relied on in support of those submissions.

8. As a first appellate court, this Court has a duty to examine matters of both law and facts and subject the case before the trial court to a fresh and exhaustive scrutiny, drawing its own independent conclusions. See **Selle vs. Associates Motor Boat & Co. [1968] EA 123**.

9. This is an appeal on an *ex-parte* order. The first ground was that the trial court erred in entertaining the matter yet it had no jurisdiction. In the case of **Republic v Karisa Chengo & 2 others [2017] eKLR**, the Supreme Court of Kenya stated that: -

“Jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “... 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 decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“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 the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

From these definitions, it is clear that the term “jurisdiction”, as further defined by The Black’s Law Dictionary, 9th Edition, is the Court’s power to entertain, hear and determine a dispute before it”.

10. In the celebrated Court of Appeal case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**, also cited and relied upon by the appellant, Nyarangi JA famously stated: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. **Section 7(1) of the Magistrates’ Court Act, 2015** provides for the civil pecuniary jurisdiction of the Magistrates’ Courts as follows: -

“(1) 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 a senior resident magistrate; or

(e) five million shillings, where the court is presided over by a resident magistrate.”

12. From the plaint, it is clear that the appellant advanced the respondent facilities whose aggregate amount exceeded Kshs. 70,000,000/-. The dispute is about the right to possession and ownership of the subject motor vehicles. The value of the said vehicles, as pleaded by the respondent in paragraph 9 of the plaint, was **USD 702,881.11**. This is equivalent to Kshs. 70,288,111/- by the then exchange rates of Kshs.100/- for USD1.

13. In the supporting affidavit of **Joseph Lule** sworn on 22/10/2020, the value of the said vehicles was given as Kshs. 46,130,000/- in the Valuation Reports by Regent Automobile Valuers & Assessors annexed thereto.

14. Accordingly, it was clear and beyond any doubt that the value of the subject matter of the dispute between the parties was far in excess of the jurisdiction of the trial court. The value exceeded the Kshs. 7,000,000/- pecuniary jurisdiction of the Senior Resident Magistrate who entertained the matter. It is surprising that the trial court did not bother to see this glaring irregularity before issuing the orders it did.

15. It is the firm belief of this Court that, it is the duty of every court, before entertaining any matter before it, and in particular *ex-parte*, to first satisfy itself that it has jurisdiction to handle the same. This will enable that court to save the parties the unnecessary costs in setting aside worthless proceedings and orders arising from unlawful exercise of jurisdiction.

16. Accordingly, this Court finds that the trial Court did not have the pecuniary jurisdiction to entertain the application before it and the suit

generally.

17. Having found that the trial court lacked jurisdiction, I need not then delve to what the effect of the orders it gave was.

18. Accordingly, I allow the appeal, set aside the order of 19/10/2018 and substitute therefor with an order striking out the suit with costs to the appellant. The appellant shall have the costs of the appeal.

It is so decreed.

DATED and DELIVERED at Nairobi this 14th day of December, 2020.

A. MABEYA, FCIArb

JUDGE