



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 79 OF 2018**

**ALEXANDER KIMUTAI KIGEN KOSGEY.....APPLICANT/PLAINTIFF**

**VERSUS**

**ERIC KIMATHI KIRIMA.....1<sup>ST</sup> DEFENDANT**

**JUSTINE KENDI MUNGANIA.....2<sup>ND</sup> DEFENDANT**

**JENNIFER M. GITONGA.....3<sup>RD</sup> DEFENDANT**

**EXECUTIVE SUPER RIDES LIMITED.....4<sup>TH</sup> DEFENDANT**

**JAMES NGANGA KARONGO T/A ALE AUCTIONEERS...5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a plaint dated 23<sup>rd</sup> April 2018, the plaintiff, *Alexander Kimutai Kigen Kosgey*, sued the defendants seeking the following reliefs:

*i. An order that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants refund the entire amount of KShs.4,500,000 received from the plaintiff together with interest till payment in full.*

*ii. General damages for breach of contract.*

*iii. Exemplary damages for malicious trespass.*

*iv. A permanent injunction restraining the defendants whether by themselves, their servants or agents or otherwise, from disposing or in any other way transferring the motor vehicle the subject of this suit until after the refund of the entire principal amount paid by the plaintiff together with interest at the prevailing bank rates.*

*v. Costs of this suit.*

2. The suit was filed contemporaneously with a Notice of Motion of even date principally seeking orders of temporary injunction to restrain the defendants either by themselves or through their agents from selling, disposing off, transferring, using or dealing with motor vehicle registration number KCP 111P (PE14RJO), Range Rover Autobotography and orders compelling the defendants to deposit in court the log book of the aforesaid vehicle pending the hearing of the suit. In the alternative, the plaintiff prayed that the defendants be directed to deposit KShs.4,500,000 in court, being the amount he had already paid the defendants.

3. The application was scheduled for hearing on 10<sup>th</sup> May, 2018 but on 7<sup>th</sup> May, 2018, the 1<sup>st</sup> – 4<sup>th</sup> defendants through their advocates *M/s Ogola, Okello & Company Advocates* filed a notice of preliminary objection in opposition to the application and the plaintiff's suit on grounds that they were filed in contravention of *section 7* of the *Magistrates Act of 2015*.

4. On 10<sup>th</sup> May 2018, parties agreed to have the preliminary objection heard by way of oral submissions. In his submissions, learned counsel for the 1<sup>st</sup> - 4<sup>th</sup> defendants, *Mr Odhiambo* contended that given the fact that the plaintiff was seeking a refund of KShs.4,500,000 and the vehicle subject matter of the suit is valued at KShs.13,500,000, the suit fell within the pecuniary jurisdiction of the magistrates' court which is between KShs.5,000,000 and KShs.20,000,000 and ought to have been filed in that court; that filing the suit in the High Court denied the defendants one avenue of appeal; that having filed the suit in the High Court which in his view has no jurisdiction to entertain the same, the

suit is a nullity and cannot be transferred to the lower court. Counsel opined that the only option left for the court was to dismiss the suit with costs.

5. Learned counsel for the plaintiff *Mr Masolia* opposed the preliminary objection. He submitted that under *Article 165 (3)* of the *Constitution*, the High Court has unlimited criminal and civil jurisdiction subject only to matters that fall within the Environment and Land Court and the Employment and Labour Relations Court. He urged the court to be guided by substantive justice which required that cases be heard and determined on merit. He invited the court to dismiss the preliminary objection with costs.

6. I have considered the preliminary objection and the parties' rival submissions.

As clearly shown in the plaint, the plaintiff's claim is for a refund of KShs.4,500,000; general and exemplary damages for breach of contract and malicious trespass respectively. There is also a prayer for a permanent injunction to restrain the defendants from disposing or transferring the aforesaid motor vehicle.

7. Under *section 7* of the *Magistrates Court Act of 2015*, the magistrate's court has pecuniary jurisdiction to adjudicate over proceedings of a civil nature in which the value of the subject matter does not exceed KShs.20,000,000.

I therefore concur with learned counsel *Mr Odhiambo* that the claim in the instant suit falls squarely within the jurisdiction of the magistrate's court and ought to have been filed in that court.

8. I however beg to disagree with *Mr Odhiambo's* submission that since the suit was filed in the High Court and not in the magistrate's court, it was filed in a court without jurisdiction and is consequently a nullity which is incapable of being transferred to the magistrate's court.

Though *section 11* of the *Civil Procedure Act (the Act)* provides that a suit shall be instituted in the court of the lowest grade competent to try it, the institution of suits which ought to be filed in the magistrate's court in the High Court does not make the suits nullities in law since as correctly pointed out by the plaintiff's counsel, under *Article 165 (3)* of the *Constitution*, the High Court has unlimited civil and criminal jurisdiction subject only to matters that fall within the jurisdiction of the Environment and Land Court and the Employment and Labour Relations Court.

9. In view of the foregoing, it is my finding that though ideally suits whose subject matter has a value not exceeding KShs.20,000,000 should be filed in the magistrate's court, in the event that such suits are filed in the High Court, the High Court has discretion either to hear them or transfer them to the court with the appropriate jurisdiction.

10. The transfer of cases pending in the High Court to the magistrate's court is envisaged in *Section 18* of the *Civil Procedure Act* which states as follows:

***(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) .....***"

11. Besides the empowerment of the High Court by *section 18* above to transfer suits from itself to the lower court and from the lower court to itself for hearing and final disposal, the High Court can also make such orders in the exercise of its inherent powers under *section 3 (A)* if doing so would meet the ends of justice particularly if the transfer in question will further the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The overriding objective is espoused in *section 1A* of the *Act* and the court in *sub section (2)* of that section is enjoined to give effect to the objective in the exercise of its powers under the Act or in the interpretation of its proceedings. It is important to note that under *Section 18 (1)* of the Act, the court can transfer suits to the Magistrate's Courts even on its own motion without notice to the parties.

12. Having found as I have above, I am satisfied that though the instant suit ought to have been filed in the lower court, the fact that it was filed in the High Court does not render it legally invalid. Such a suit is not a candidate for striking out or dismissal as submitted by *Mr Odhiambo* but ought to be transferred to the court clothed with the appropriate jurisdiction to try it.

In the premises, I do not find merit in the preliminary objection and it is hereby dismissed with no orders as to costs.

13. Having dismissed the preliminary objection and having noted that this is a suit that ought to have been filed in the magistrate's court, I hereby exercise the powers donated to this court by *section 18* of the *Act* and order that this case be transferred to the Chief Magistrate's Court at Milimani for hearing and final disposal. The case shall be mentioned before the Chief Magistrate on a date to be agreed upon by the parties for directions and/or further orders.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI** this 14<sup>th</sup> day of June, 2018.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Miss Kisa h/b for Apollo Mboya: for the Applicant

N/A: for the Respondents

Mr Fidel Salach: Court Clerk