



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 67 OF 2015

BRUCE MUTIE T/A DIANI TRAVELS..... APPLICANT

AND

EQUITY BANK LIMITED.....RESPONDENT

RULING

1. The Bruce Mutie t/a Diani Travels the applicant herein filed Civil Suit No. 213 of 2012 before the principal Magistrates Court Kwale against Equity Bank, the respondent. The applicant pleaded in that suit that he had obtained a loan from the respondent of Kshs 5,279,700 for the purpose of purchasing Nissan Patrol motor vehicle.

The value of that vehicle turned out to be Kshs 4.5 Million. The extra funds were refunded to the applicant. That the respondent repossessed the motor vehicle on 3rd October 2012 without Notice to the applicant. In that suit before Kwale Court the applicant prayed for the return of the motor vehicle and for an order that he could insure the vehicle with an insurance firm of his choice.

2. Before this court the applicant has filed a Notice of Motion application dated 16th March 2015. The applicant seeks an order for the withdrawal of Civil Suit No PMCC Kwale No. 213 of 2012 from Kwale Magistrate's Court and for its transfer to High Court at Mombasa for trial and disposal.

3. The ground upon which the applicant seeks to have that suit transferred to this court is that he desires to amend his claim to include his proposed prayer of loss of income which he stated was kshs 20,000 per day. That such an amendment would take the Kwale case beyond the pecuniary jurisdiction of the magistrate in Kwale Court since at present that court does not have a sitting Chief Magistrate.

4. The application was strenuously opposed by the respondent it was opposed on two main grounds.

5. Firstly the respondent submitted that the application is an abuse of the court process because it was filed to circumvent the hearing of the respondent's preliminary objection. That objection before the Kwale Court is on the ground that Kwale Court case was filed before a court that did not have jurisdiction to entertain it.

6. The second ground of opposition is that this court cannot transfer the kwale Court suit because that suit is an incompetent suit. On this ground respondent submitted that the applicant's claim before the Kwale Court was either for the amount of Kshs 5,279,700 or Ksh 4 million. That either of those two amounts were beyond the jurisdiction of a Principal Magistrate, which jurisdiction does not exceed Ksh 4

million. In that regard respondent relied on section 5 of the magistrate's Act Cap 10 which provides:

The Magistrates' Courts shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed-

- a. Seven million shillings for a Chief Magistrate;
- b. Five million shillings for a Senior Principal Magistrate;
- c. Four millions for a Principal Magistrate;
- d. Three million shillings for a Senior Resident Magistrate; and
- e. Two million shillings for a Resident Magistrate.

7. The respondent relied on various legal authorities whose import is that a suit filed in court which lacks jurisdiction cannot be transferred to another court.

8. In that case **BENJAMIN GICHANA MAYIEKO t/a BENMAN ENTERPRISES & 2 OTHERS – V- KENYA BREWERIES LIMITED [2013] eKLR** the court held thus:

“I also appreciate what Sir Udo Udoma CJ (Uganda) said in the case of Kagenyi vs Musiramo & Another [1968] EA 48 to the effect that where a suit is instituted in a court without jurisdiction, it would be incompetent for the High Court to have such a suit withdrawn and transferred to another court ostensibly with relevant jurisdiction.

In the premises, and applying all the above principles to the instant application, the application by the applicants cannot succeed because the subject matter of the application was admittedly instituted in a court which lacked jurisdiction. The said suit therefore incapable of being transferred to this court for hearing and determination.

9. Justice G V Odunga in the case **ABRAHAM MWANGI WAMIGWI –V- SIMON MBIRIRI WANJIKU & ANOTHER [2012]eKLR** eloquently expressed himself thus:

ABRAHAM MWANGI WAMIGWI V SIMON MBIRIRI WANJIKU & ANOTHER [2012]eKLR

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court.”

It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognized by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tool and proceed no further. That position was made clear by Nyarangi JA in The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1, where the learned Judge stated:

“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 its tools in respect of the matter before it the moment it holds the opinion that it is jurisdiction.”

The reason advanced by the applicant in seeking the transfer of Nairobi Chief Magistrate’s Court Civil Suit No. 229 of 2012 to the High Court is that the value of the disputed parcel of land exceeds the jurisdiction of the Court. This was the same position in Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others (Supra). I have no reason to depart from the reasoning of the learned Judge in the said decision. Matters of jurisdiction, in my view, cannot be described as technicalities of procedure. They are matters of substance since without jurisdiction the Court cannot be said to be seized of the dispute. Accordingly, lack of jurisdiction cannot be cured either by overriding objective under sections 1A and 1B of the Civil Procedure Act or Article 159(2) (d) of the Constitution. It follows that this application has no merit.

10. Justice Kimaru in the case NDYKAK INVESTMENT LTD –V- JOSEPH IRUNGU [2006] eKLR stated:

I think the true position of the law as stated in the above quoted case is that this court cannot invoke its discretion under Section 18 of the Civil Procedure Act to transfer a suit which was filed in a court without jurisdiction to a court jurisdiction. Before this court can exercise its discretion as provided by Section 18 of the Civil Procedure Act, it must first be satisfied that the suit was filed in a court which had jurisdiction. In effect Section 18 of the Civil Procedure Act only empowers this court to transfer a suit from one court of competent jurisdiction to another court of competent jurisdiction.

11. In response to that opposition the applicant submitted that this court does have jurisdiction to transfer the Kwale suit to this court. This is how applicant’s learned counsel submitted:

“In response to this objection it is submitted that while it is true that the High Court has no power to withdraw and transfer a suit filed in a court without jurisdiction, which is not the case here. For, while it may seem a matter of some clarity that the preliminary limit of the Court in Kwale being Kes.4 million and the value of the subject matter as pleaded at the time of filing being Kes.4,500,000/=, the court has no jurisdiction. However, it is worthy of note that even though the Kwale Court has for some time been under the leadership of a Principal Magistrate, it has not, like any other Magistrate’s court, been condemned to remain so. Indeed, it is only recently, as late as 2012, that the pecuniary jurisdiction of that cadre of officer was universally set at Kes.4 million courtesy of the Statute Law (Miscellaneous Amendment) Act No 12 of 2012 that amended the Magistrate’s Courts Act, cap 10 by reclassified the pecuniary jurisdiction of all magistrates with reference to the specific cadres they occupy, so that all officers of similar cadre enjoy the same level of pecuniary jurisdiction in civil cases.”

ANALYSIS AND DETERMINATION

12. The principle to be found in the cases relied upon by the respondent is in my view sound in Law. An incompetent suit cannot be transferred because to transfer it would be to transfer that which Lacks Life. Thus far I am in agreement with the respondents authorities.

13. What however I find ought always to be considered by a court facing an application for transfer of suit is, when does a suit become incompetent. Is it when the suit is filed or commences hearing or at delivery of judgment. That question was considered by the court of appeal in the case JOSEPH MUTHEE KAMAU & ANOTHER –V- DAVID MWANGI GICHURU & ANOTHER [2013] eKLR. This is what the court of appeal stated:

“In the instant case, the subordinate court had jurisdiction subject to the upper limit of the damages being Kshs. 300,000/=. We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.” (emphasis mine).

From that holding it becomes clear that the determination of whether a court has jurisdiction can also be determined at the hearing of the suit. The submission then, made by the applicant's learned counsel becomes very pertinent here. He submitted that by the time the Kwale suit is fixed for hearing there may well be a Chief Magistrate presiding before that court and since the Chief Magistrate's jurisdiction as per section 5 of Cap 10, as seen above, is kshs 7 million such a Magistrate could hear this case. It is therefore in my view premature at this stage to determine whether Kwale Court has or has not got jurisdiction to hear the applicant's case. This is because that case has not yet been fixed for hearing and by the time it comes up for hearing it may have a presiding judicial officer with jurisdiction. To hold otherwise would lead to absurdity where by if a case was filed in a Magistrate's Court presided over by a principal Magistrate who has pecuniary jurisdiction of kshs 4 million, if that Magistrate was transferred from that court leaving a Resident Magistrate, whose pecuniary jurisdiction is kshs 2 million, presiding over court whoever would have a case for an amount in excess of Kshs 2 million would deemed to have an incompetent suit. The law does not create an absurdity.

14. Section 18 of the Civil Procedure Act Cap 21 clothes this court with the discretion, either on application or on its own motion to withdraw any suit or other proceedings pending in court that is subordinate to it and thereafter to dispose the same or transfer the same for trial or disposal at any court subordinate to it. The court's in exercise this discretion have in the past considered the convenience in administration of justice, the interest of the parties, and the nature of the proceedings.

15. The respondent did not state any inconvenience it would suffer nor did it address the other considerations which are considered by the court and accordingly I do find that there is merit in granting the applicant the prayer he seeks to ensure that his whole case is determine. To do so in my view would be in tandem with the overriding principle of the Civil Procedure Act.

16. Accordingly I grant the following orders:

a) The Civil Suit No PMCC 213 of 2012 Kwale Magistrate's Court is hereby withdrawn and is hereby transferred to this court for trial and disposal.

b) The costs of the Notice of Motion dated 16th march 2015 are awarded to the respondent in any event.

DATED and DELIVERED at MOMBASA this 30TH day of JULY, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A Kavuku

For Applicant:

For Respondent:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE