



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Miscellaneous Application 92 of 2011**

**BENJAMIN GICHANA MAYIEKO trading as**

**BENMAN ENTERPRISES ..... 1<sup>ST</sup> APPLICANT**

**EVERLYNE MOGOTU OSUGO trading as**

**KILGORIS DISTRIBUTORS ..... 2<sup>ND</sup> APPLICANT**

**SAGWE MOGABI trading as**

**MOBAMBA STOCKIEST ..... 3<sup>RD</sup> APPLICANT**

**VERSUS**

**KENYA BREWERIES LIMITED ..... RESPONDENT**

**RULING**

1. By the application dated 3<sup>rd</sup> August 2011 and filed the following day 4<sup>th</sup> August 2011, the plaintiffs/applicants seek orders that Civil Case No.165 of 2011 be transferred from the Chief Magistrate’s court – Kisii to the High Court of Kenya at Kisii for hearing and disposal.

2. The application is supported by an affidavit sworn by Benjamin Gichana Mayieko the 1<sup>st</sup> plaintiff/applicant and is based upon the following grounds:-

1. *The applicants desire to amend their plaint in KISII CMCC NO.165 OF 2011 (hereinafter referred to as “the primary suit”).*

2. *The desired amendment will deprive the Chief Magistrate’s Court of pecuniary jurisdiction to hear and determine the primary suit.*

3. *It is procedurally necessary that the instant application be first mounted so that upon the same being allowed, the applicants can have opportunity to seek leave of this honourable court to amend their plaint*

*as desired.*

4. *To allow the instant application would give effect to the applicant’s*

*constitutional right of access to justice.*

5. *The respondents do not stand to suffer prejudice which cannot be compensated by an award of costs, reasonable in the circumstances.*

6. *The primary suit is pending fresh hearing and determination by the Chief Magistrate's court. Inasmuch as this honourable court has jurisdiction to transfer a suit at any stage of its prosecution, it is prudent that the same be transferred at this stage.*

7. *This application has been preferred with due promptitude.*

3. In opposition to the application the defendant/respondent filed the following grounds:-

1) *The application is frivolous and vexatious and an abuse of the process of court.*

2) *The application is incompetent and unknown in law.*

3) *The applicants are attempting to circumvent the Respondent's Preliminary Objection.*

4) *The application is vague and designed to hoodwink the court into granting orders which ought to be made in the lower court.*

5) *The purported proceedings in the lower court are a nullity and cannot be transferred as sought.*

6) *The action open to the applicants is to withdraw the irregular suit in the lower court and file a proper suit in the High Court.*

7) *The applicants still recognize the jurisdiction of the lower court.*

4. There is also filed a Replying Affidavit sworn by Ronald Luby, the Assistant Company Secretary of the Defendant/Respondent where he states that the application is bad in law on the following grounds:-

1) *It is wanting in substance as the High Court does not have jurisdiction to entertain the same.*

2) *The primary suit Kisii CMCC NO.165 of 2011 is a nullity and cannot be withdrawn and transferred to the High Court.*

5. He also states that the applicant has failed to disclose to the court all materials in the case before the subordinate court and further that he has engineered the application to defeat the respondent's preliminary objection raised in the Chief Magistrate's Court challenging its jurisdiction to hear the dispute. The defendant/respondent prays that the application be dismissed with costs.

6. The application was canvassed by way of written submissions. Parties filed their submissions replete with authorities on 11<sup>th</sup> November 2011 and 14<sup>th</sup> February 2012 respectively. While admitting that the sums pleaded in the plaint exceeded the pecuniary jurisdiction of the Chief Magistrate's Court, counsel for the applicants submitted that that fact alone did not or does not mean that the subordinate court did not have jurisdiction to entertain the suit. To support this contention, counsel submitted that what the applicants are seeking in the primary suit are declaratory orders, and this being the case, the Chief Magistrate's court had the jurisdiction to grant the reliefs sought in the plaint. Reliance was placed on the Court of Appeal decision at Kisumu in **Civil Appeal Number 182 of 2006 between Johana Nyokwoyo Buti and Walter Rasugu Omariba & others**. Reliance was also placed on the provisions of **Order 3 Rule 9** of the **Civil Procedure Rules** to the effect that:-

**“No suit shall be open to objection on the grounds that a merely**

**declaratory judgment or order is sought thereby, and the court may make a binding declaration of**

**right whether any consequential relief is or could be claimed or not.”**

7. I wish to point out at the outset that the authority cited by the applicants herein is clearly distinguishable from the facts of this case and does not apply. In the said case, the issue was whether the High Court had jurisdiction to entertain a suit emanating from a decision of a Land Disputes Tribunal which had acted beyond its powers and whose decision had consequently been adopted by a magistrate’s court without the knowledge and/or inclusion of the Respondent. The set of facts in the present suit are different.

8. The submissions of the Respondent are to the effect that clearly, and it being so admitted, by the applicants, the Chief magistrate’s court having not been seized of the jurisdiction to hear and determine the applicants’ suit in the first instance, such a suit is incapable of being transferred to this court for the purposes which the applicants have set out in the body of their application. The firm of Lutta & Company Advocates for the Respondents supplied 6 authorities for the guidance of the court. It was submitted that this application is an abuse of the court process and demonstrates lack of goodwill on the part of the applicants.

9. To support counsel’s contention that the applicants are not acting in good faith, counsel submitted that when the matter came up before the Chief Magistrate’s Court for hearing inter partes on 5<sup>th</sup> July 2011, the same was adjourned to 9<sup>th</sup> August 2011 for hearing, but on that day, it was said that Mr. Minda, advocate for the applicants was unwell. On the 9<sup>th</sup> August 2011, counsel for the Respondent discovered that the applicants had changed counsel just before the said date and had proceeded to file the instant application. Counsel contended that the adjournment sought on 5<sup>th</sup> July 2011 was not well intentioned and that it was intended to hoodwink and trick the court into granting the adjournment for purposes other than those indicated to the court. Counsel also submitted that the applicants lacked bona fides in filing the instant application. Reliance was placed on the case of **Boniface Waweru Mbiyu –vs- Mary Njeri & another [2005] e KLR** where Ojwang J. (as he then was) decried discourtesy and lack of bona fides by the applicant in that case in the following words:-

**“Firstly legitimate questions have been raised regarding the bona fides**

**of the application, and, I think, counsel for the plaintiff has not responded to these sufficiently. Even as he was seeking adjournment for something like a fortnight, to enable him to make a presentation at the Chief Magistrate’s Court, he was applying to this court to remove his case from the Chief Magistrate’s Court and to have it heard in the High Court. For this clear discourtesy to the Chief Magistrate’s Court, counsel’s only justification was that, after all, the High Court had unlimited jurisdiction and was duly empowered to hear the case.”**

10. Counsel also contended that the applicants have not given sufficient cause to warrant the orders sought. According to the applicants, the following

reasons have informed their decision to file this application:-

a) *The proposed Amended Plaintiff is instituted as filed in the Chief Magistrate’s Court, this is not withstanding that the Applicant, on the face of the Notice of Motion admits lack of pecuniary jurisdiction by that court to determine the matter.*

b) *The “Proposed Amended Plaintiff” is wishful thinking and has not been done. It is a “promise” to Amend which the Applicants may amend or fail to do.*

c) *The proper procedure would have been that the application for amendment is made in the lower court and is determined or pending hearing and determination.*

11. It is counsel’s contention that the applicants are being highly presumptuous and pedantic in making this application. Further, counsel submitted that in view of the averments in the plaint, and in particular paragraphs 4, 5, 6, 7 and 8 the Chief Magistrate’s Court lacks the jurisdiction to hear and determine the

applicants' suit being Kisii CMCC NO.165 of 2011 as the amounts claimed are far in excess of the court's pecuniary jurisdiction. Reliance was placed on **section 5** of the **Magistrate's Courts Act, Cap 10 Laws of Kenya** which provides as follows:-

**“Subject to any other written law, the Resident Magistrate's Court**

**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 one hundred thousand shillings, or three hundred thousand shillings where the court is held by a principal or senior resident magistrate and five hundred thousand shillings where the court is held by Chief Magistrate or a Senior Principal Magistrate.”**

**Provided that the Chief Justice may, by notice in the Gazette increase the limit of jurisdiction of:-**

- a) Chief Magistrate to a sum not exceeding three million shillings;**
- b) A Senior Principal Magistrate to a sum not exceeding two million shillings;**
- c) Principal Magistrate to a sum not exceeding one million shillings;**
- d) A Senior Resident Magistrate to a sum not exceeding eight hundred thousand shillings;**
- e) A Resident Magistrate to a sum not exceeding five hundred thousand shillings.”**

12. On the basis of the above, counsel submitted that a case filed in a court without jurisdiction is a nullity and amounts to no suit and is therefore incapable of transfer. In this regard, reliance was placed on the case of **Associated Warehousing Ltd.-vs- Clarkson & Southern Ltd. – Mombasa HC Civil Appeal No.166 of 2007** in which the Respondents in the appeal had applied for an eviction order in the original suit in the Magistrate's Court in Mombasa in respect of property valued at Kshs. 80 Million. The eviction order was granted as prayed. On appeal, the issue of jurisdiction of the magistrate's court came up and in his judgment, Ojwang J (as he then was) rendered himself thus on that particular issue:-

**“Learned counsel submitted that “the powers of a Magistrate or a**

**Judge faced with a suit filed without jurisdiction are limited to striking it out”, and “such a suit cannot be withdrawn”, the magistrate or judge cannot go into the merits and cannot hear any other application including an oral application to withdraw. Counsel submitted that” the Magistrate had no jurisdiction to hear and determine an oral application for the withdrawal of the suit.”**

**The central issue in this appeal is jurisdiction: did the learned magistrate have the jurisdiction to entertain Mombasa RMCC No.2501 of 2007, to hear both written and oral applications under it, or to make the Order made?**

**The governing law is the Magistrate's Courts Act (Cap 10, Laws of Kenya), s.5 (1) of which provides:**

**“Subject to any other written law the resident magistrate's**

**court 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 one hundred thousand**

**shillings, or three hundred thousand shillings where the court**

is held by a principal or a senior resident magistrate and five hundred thousand shillings where the court is held by a chief magistrate or a senior principal magistrate ....”

The appellant has annexed with the record of appeal a valuation of the suit property by Ms. Dato Kithikii Limited, Valuers, Estate Agents, Managing Agents and development Consultant dated 5<sup>th</sup> September, 2007: insurance replacement value is given as Kshs.51,000,000/=; forced sale value as Kshs.56, 000,000/= mortgage value as Kshs.68,000,000/= and open market value as Kshs.80,000,000/=.

Such an order of value-estimate, clearly surpasses the pecuniary jurisdiction of any category of magistrate’s courts; it is the typical case for the High Court, with its unlimited civil jurisdiction. I will, therefore, uphold the submission by Mr. Kinyua that the learned magistrate had no jurisdiction in Mombasa RMCC No.2501 of 2007. Since this fact was so obvious, a question may be raised regarding the advice of counsel who rendered service to the litigant.

The law of jurisdiction has been held, in Kenya’s judicial experience, to be virtually inexorable. In Owners of the Motor vessel “LillianS” –v- Caltex Oil (Kenya) Ltd. [1989] KLR 1, Nyarangi, JA, thus stated (at PP.14-15):

“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”

By the law of jurisdiction, the learned magistrate had no competence to entertain Mombasa RMCC No.2501 fo 2007; could not hear and determine any application – ex-parte or inter partes – under the same; and could not proceed to hear an oral application under such suit, or formal application, and proceed to give a Ruling and issue Orders. However, the learned magistrate had the competence to pronounce his court to be devoid of jurisdiction, and to free himself of all judicial proceedings in the relevant matter.”

13. I entirely agree with the law as stated by the learned judge and adopt the same as clearly applicable in this matter. 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.

14. 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 is therefore incapable of being transferred to this court for hearing and determination.

15. I also find that the applicants were not bona fides in mounting this application. Accordingly the application be and is hereby dismissed.

16. Costs of the application to the Respondent.

17. It is so ordered.

**Dated and delivered at Kisii this 21<sup>st</sup> day of March, 2013**

**RUTH NEKOYE SITATI  
JUDGE.**

***MISCELLANEOUS CIVIL APPLICATION NO. 92 OF 2011***

***NO.714***

In the presence of:

Mr. Minda for Nyamurongi for Plaintiffs/Applicants  
N/A for M/s Lutta & Co. for Defendant/Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI  
JUDGE.**

***MISCELLANEOUS CIVIL APPLICATION NO. 92 OF 2011***