



Bebadis Company Limited v Nyotta & another (Environment & Land Miscellaneous Case E011 of 2022) [2022] KEELC 2272 (KLR) (23 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E011 OF 2022**

JA MOGENI, J

MAY 23, 2022

BETWEEN

BEBADIS COMPANY LIMITED APPLICANT

AND

JASPAL NYOTTA 1ST RESPONDENT

SEDCO CONSULTANT LIMITED 2ND RESPONDENT

RULING

1. Before this Court for determination is a miscellaneous suit filed vide an Application dated 14/1/2022 and is brought under the provisions of Sections 1A, 3A and Section 18 (b) (i) of the [Civil Procedure Act](#), Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010, Article 159 of the [Constitution](#) of Kenya and the inherent power of this Honourable Court and all other enabling provisions of the Law. The Applicant is seeking for the following Orders:
 1. Spent.
 2. Spent.
 3. That this Honourable court be pleased to withdraw the Milimani CMCC No. 10717 of 2018 from Chief Magistrate Court and transfer the same to this Honourable Court for trial and determination.
 4. That if prayer 3 above is granted, the Subordinate Court file Milimani CMCC No. 10717 of 2018 be allocated a new High Court number at Milimani Environment and Land Court registry for purpose of trial and determination.
 5. That the cost of this application be provided for.



2. Before the said application could be heard and determined, on 30/01/2022, the 1st and 2nd Respondents filed a Notice of Preliminary Objection dated 28/01/2022. The grounds of the 1st and 2nd Respondents' Preliminary Objection were as follows: -
 1. That the Applicant's Miscellaneous application is a nullity, hopelessly misconceived, frivolous, totally devoid of merit and not properly before this Court and as such the Honourable Court has no jurisdiction to hear the Miscellaneous application for the reason inter-alia, that the fatally defective Application by the Applicant is consisted of a Draft Amended Defence and Counterclaim with respect to which leave had not been given and or allowed to the former Director and hence the Application is based on a pleading that is not properly on record.
 2. That the Applicant lacks *locus standi* to file this said application as it is filed by a former Director who has no authority of the Company to institute such an application before this Court as the Advocates on record have since amended their Defence and no such claim, as now sought, to be transferred before this Court arises, hence the present Notice of Motion as taken out, drawn and filed is incompetent, fatally defective and unsustainable in law or at all.
 3. That the said Application is *Res judicata* pursuant to Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya in view of the fact that there were previous proceedings before this Honourable Court wherein the same orders sought in the now draft Counter claim therein were already determined by the Court in ELC Miscellaneous Application E055 of 2020 between Bebadis Ltd & Daniel Kimani Kariuki vs Jaspal Nyotta, Sedco Consultants Limited and Paul Ruttoh in which the subject matter was directly and substantially in issue as in the proceedings herein.
 4. That in this case, the Applicant having withdrawn their application in the earlier proceedings before this court, panel beat the facts to take a new shape by simply adding a few words and changing the value of the claim in the Counterclaim from Kshs. 259,308,911.98 to now Kshs. 33,035,772.00 for purposes of instituting this application on basically the same facts and same issues as determined by this court.
 5. That the issues the Applicant is drawing to the attention of this Court to cause the transfer of the subject suit to a Court with pecuniary jurisdiction, are sub-judice as the same being directly and substantially in issue in the Milimani HCC 115 of 2018 Bebadis Co. Ltd, Daniel Kimani and Ruth Wanjiru Waigua vs. Sylvia Wambui Karanja and the Ridgeways Yard Co. Ltd filed in Nairobi, and is inviting the Respondents who are not privy to the same and the determination of the said issues are pending before the said Court having jurisdiction to grant the relief's sought in the Amended Defence and Counterclaim.
 6. That the Applicant is forum shopping and has no right of audience before this Honourable Court and the Application herein constitutes a gross abuse of the Court process and should be struck out at once with costs.
 7. That the said draft Counterclaim purports to add another Defendant to the said Defence and Counterclaim who was not a party to the suit being sought to be transferred hence a clear breach of Order 1 rule 10 (2) which grants the court therein powers to substitute or add another party (in this case a new defendant) whereas no such order has been made by the said trial court.
 8. That in the earlier suit, this Honourable court heard and finally determined the issues now raised in this Application and the Applicant is barred by virtue of the operation of the doctrine of issue estoppel.



9. That the Application is based on a draft Counter claim where the Applicant now introduces another party namely Paul Kiprutto Ruttowho is the Director of the 2nd Plaintiff (in the suit sought to be transferred) who has now been sued and or enjoined in the said Counterclaim filed in that Court in his personal capacity contrary to the trite principles in *Salomon vs Salomon Co.* [1897] A.C.22.
10. That in whole, the application herein is vexatious and frivolous litigant and the proceedings herein, an abuse of the court process.
3. Both the Application and the Preliminary Objection were canvassed together by way of written submissions. The parties submitted and a Ruling date was scheduled.
4. By the time of writing this Ruling, it is only the Applicant who had filed its submissions in regard to the Application dated 14/01/2022 and the Preliminary Objection dated 28/01/2022. The Applicant's submissions are dated 1/03/2022 and filed on 4/03/2022. The Applicant filed a Supplementary Affidavit in response to the Preliminary Objection sworn on 10/2/2022 and filed on 4/03/2022.
5. The Court has now carefully read and considered the Notice of Preliminary Objection dated 28/01/2022 and the Application dated 14/01/2022, the Applicant's written submissions and the Pleadings in general and finds that the issues for determination are whether the Notice of Preliminary Objection is merited and whether the Applicant's Application is merited.

i. Whether the Notice of Preliminary Objection is merited

6. Do the Grounds of Objections raised by the 1st and 2nd Respondents qualify to be a Preliminary Objection as was described in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, where Law J A stated that: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”.

Further the Court stated:-

“A preliminary objection raises a pure point to law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

7. The Court has considered the ten (10) grounds raised by the 1st and 2nd Respondents. On ground No. 1 and 2 on locus standi of the Applicant and on jurisdiction, the 1st and 2nd Respondents have made allegations that the amended defence and counterclaim was not properly on record. The Court notes that this present Application is based on the said amended defence and counterclaim. The issues raised go to the jurisdiction of the Court and does not require the ascertaining of facts as Jurisdiction is everything and without Jurisdiction the court has no option but to down its tools. See the case of *Owners of Motor Vessel 'Lilian S' -vs- Caltex Oil (Kenya) Ltd* (1989) 1 KLR, where the Court held that:-

“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 at the moment it holds the opinion that it is without Jurisdiction.”



8. The Court herein is required to determine what the law says and whether indeed the court lacks jurisdiction emanating from the Applicant's lack of *locus standi* to institute this application and will not require the probing of evidence. All that the Court would then need to do is determine what the law says, and this would only mean that the same raises a pure point of law.
9. On ground No. 1, an objection challenging the standing of the suit was raised. In essence, the objection was to the effect that the suit was fatally defective and a nullity because that the fatally defective Application by the Applicant is consisted of a Draft Amended Defence and Counterclaim with respect to which leave had not been given and or allowed to the former Director and hence the Application is based on a pleading that is not properly on record contrary to Order 8 Rule 3 of the Civil Procedure Act. Therefore, they contended that this Court lacked jurisdiction to entertain the application.
10. Article 159(2)(d) of *the Constitution* of Kenya mandates courts to administer justice without undue regard to procedural technicalities. However, the record reveals that the said amended Defence and Counterclaim in question was properly filed before the lower court pursuant to a Court Order issued on 12/01/2022. The Applicant had been granted leave to do the same.
11. On ground No. 2, from the description of Preliminary Objection in the Mukisa Biscuits case (supra) and given that an issues of *locus standi* is a point of law that touches on jurisdiction of the Court and that it should be resolved at the earliest opportunity, it does not involve ascertaining of facts, then the instant Notice of Preliminary Objection as raised by the 1st and 2nd Respondents meets the test of what amounts to a Preliminary Objection. It raises pure points of law, and it can be determined without ascertainment of facts from elsewhere but from the pleadings. Consequently, the Court finds and holds that the ground No. 2 of the Notice of Preliminary Objection as filed by the 1st and 2nd Respondents is a Preliminary Objection as per the Mukisa Biscuits case (supra). The Court will then determine whether the Preliminary Objection on jurisdiction is merited.
12. In the case of *Law Society of Kenya -vs- Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that ;

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

Further in the case of *Alfred Njau and Others -vs- City Council of Nairobi* (1982) KAR 229, the Court also held that;-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
13. Indeed, as the issue of the *locus standi* of the Applicant goes to the root of the matter, poring over and examining of their documents cannot be avoided as this court will have to be satisfied that they had jurisdiction to institute the proceedings herein. Lack of *locus standi* can dispose of the matter preliminarily without having to resort to ascertaining of facts. The Preliminary Objection raised by the Defendants fits the description of Preliminary Objection as stated in the Mukisa Biscuit case (Supra).
14. The 1st and 2nd Respondents have submitted that the Applicant has no locus standi to file this application. That due to the lack of the said capacity, the present Notice of Motion is incompetent and defective.



15. Notably, Article 50 of the [Constitution of Kenya, 2010](#) provides that every person has a right to access a court of law for the determination of a dispute. However, the court notes that the lower court already found that the Applicant herein was the director of the company vide court order issued on 21/11/20218 in civil suit no. E115/18. On top that, the applicant has filed two Board Resolutions authorizing Daniel Kimani Kariuki dated 10/01/2022 and 3/02/2022 to more or less handle litigation on behalf of the company in the related suits. There were also documents in the Applicant's bundle that demonstrated that the Daniel Kimani Kariuki is a director in the Company. Conversely, the question of whether or not the applicant is a former director is beyond the scope of the Preliminary Objection herein as evidence ought to be tendered to establish the same. Certain facts must be ascertained and therefore the issue at hand cannot be determined via a Preliminary Objection, as the Court will have to take evidence to determine the same. See the case of [Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga -vs- Eliud Timothy Mwamunga & Sagalla Ranchers Limited](#) [2017] eKLR.
16. Consequently, I am of the view that this Court has jurisdiction to hear and determine the present application hence ground No. 1 and 2 of the objections cannot be upheld.
17. The 1st and 2nd Respondents have also averred that the Application herein is that the suit is Res Judicata and sub-judice. In the case of [Henry Wanyama Khaemba -vs- Standard Chartered Bank Ltd & Another](#) (2014) eKLR, the Court held that:
- “That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.
18. Further in the case of [George Kamau Kimani & 4 Others -Vs- County Government of Trans Nzoia & Another](#) (2014), eKLR, the Court held that:-
- “I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.
19. It is not in doubt that for the Court to ascertain whether the instant suit is Res Judicata, unprocedural or bad in law and an abuse of the Court process, the Court will have to ascertain and probe evidence more so as the parties are disputing various issues. Further the issue on whether or not the application is Sub-judice, facts have to be ascertained and a Preliminary Objection cannot be raised on disputed facts. Therefore, the Court finds and holds that grounds No. 3,4, 5 and 8 are not pure points of law as they are not capable of disposing off the matter preliminarily without calling for evidence, probing it and the Court ascertaining facts from elsewhere and therefore the same are not properly raised Preliminary



Objection . See the case of *Quick Enterprises Ltd -vs- Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

20. See also the case of *United Insurance Co. Ltd -vs- Scholastica A. Odera*, Kisumu HCCA No.6 of 2005, where the court held that:-

“ A Preliminary Objection must be based on a point of law which is clear and beyond doubt and Preliminary Objection which is premised on facts which are disputed cannot be used to determine the whole matter as facts must be precise and clear to enable the court to say the facts are not contested or disputed.”

21. As has been seen hereinabove, the effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party its day in court. Such summary dismissal or striking out of a case is a draconian issue that must be exercised with caution and as a last resort.

22. From a perusal of the ground No. 6, 7, 9 and 10, it is apparent that they do not raise pure points of law. They require production of evidence and cannot be argued in limine. They require scrutiny of facts. The facts therein are contested and as such they need to be ascertained. Ground no. 7 and 9 require to be brought by way of motion. The 1st and 2nd Respondents need to institute a formal application at the appropriate time. Therefore, the Court finds that the test laid down in the case of *Mukisa Biscuit Manufacturing Co Ltd* (supra) has not been met.

23. Further, this Court is not satisfied that the grounds being relied on by the 1st and 2nd Respondents had reached the threshold of dismissing the present application. Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

Conclusion and Disposition of the Preliminary Objection

24. When all is considered therefore, the Court finds and holds that the Notice of Preliminary Objection is not merited and the same is dismissed entirely with costs being in the cause.

ii. Whether the Applicant's Application dated 14/01/2022 is merited.

25. The Court has now carefully read and considered the Application and the applicant's written submissions and the issue for determination is whether the Applicant is entitled to the orders sought.

26. As rightly submitted by the Applicant, Section 18 of the *Civil procedure Act* bestows upon the High Court the powers to transfer suits of a civil nature. It provides: -

“(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) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
- (i) try or dispose of the same; or
- (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn”.

27. Further the Applicant relied on Sections 1A and 3A of the *Civil Procedure Act* that generally stipulate the overriding objectives and inherent powers. It is also apparent under Section 18 above, that this Court has power to order transfer and re-transfer of a suit on its own motion or on application by a party.
28. The power to transfer a suit is discretionary. It is therefore not in doubt that the party applying for a transfer has the burden of providing sufficient reasons as to why the transfer is merited. It is the Applicant’s contention that he has since filed an amended Defence and a Counter claim which the Lower Court has no jurisdiction over. So that in essence, the Applicant is seeking for the transfer of the suit property based on the fact that the subordinate Court does not have the Jurisdiction to deal with the matter.
29. The Application is premised on grounds that this Court essentially has powers to call the file from the subordinate court to the High Court for hearing and determination. That the prayers sought by the Applicant’s counterclaim, who is the third party in that matter being CMCC 10717 of 2018, can only be granted by the High Court.
30. The Applicant deponed that by virtue of the statement of amended Defence and Counterclaim in CMCC 10717 of 2018, the Counterclaim is in excess of Kshs. 33,035,772.00 and as such that exceeds the pecuniary jurisdiction of the Chief Magistrate’s Court. It is the Applicant’s case that once the counterclaim was filed in CMCC 10717 of 2018, the subordinate court ceased to have jurisdiction over the suit.
31. Jurisdiction is everything and without jurisdiction the Court has no option but to down its tools. See the celebrated case of The *Owners of Motor Vessel Lilian “S”* case (Supra). A Court can only exercise jurisdiction conferred upon it by statute or constitution or both. Nothing more or less. So serious is this issue that parties cannot consent to clothe a Court with jurisdiction that it lacks.
32. In a more recent decision, *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR, the Court of Appeal said:

“ ... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first placed. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. without jurisdiction, the Court cannot confer jurisdiction upon itself ...”



33. When it comes to exercise of power to transfer suits or appeals, filed before a court without jurisdiction like in the instant case, the Court of Appeal stated, in Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR, as follows:

“In numerous decided cases, courts, including this Court, have held that it would be illegal for the High Court in exercise of its powers under S. 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court having jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled law that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.”

34. In the case of Mini Bakeries (NRB) Limited vs Levi Kariz Oriedo (2020) eKLR the court stated that: -

“A suit or appeal filed before a court which has no jurisdiction is incompetent and is not available for transfer to the court with jurisdiction. The fate that such suit or appeal should suffer is that of being struck out.”

35. In the case of Tata Chemicals Magadi Limited vs County Governor, Kajiado County & another; National Environmental Management Authority & another (Interested Parties) (2020) eKLR, the court held the same view and stated that: -

“Further, I am of the view that since Jurisdiction is primordial and cannot be equated to a procedural technicality, and where a court lacks jurisdiction and has downed its tools, the same cannot be cured by Sections 1A, 1B and 18 of the Civil Procedure Act. I opine that the Applicant has a remedy to withdraw the lower court suit and file a fresh one in this court for hearing and final determination”.

36. In the circumstance of this case, I find that the suit was filed in a Court without jurisdiction and the court cannot rescue an incompetent suit through transfer. The remedy is to withdraw the said suit and file it in a court with competent jurisdiction. I therefore find the Application dated 14/01/2022 is not merited and the same is dismissed. There is therefore nothing pending in this matter. Each party to bear its own costs. File closed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2022.

MOGENI J

JUDGE

In the Presence of:

.....for the Plaintiff

.....for the Defendants

Vincent Owuor Court Assistant

