



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc.Civil Suit 311 of 2008**

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

BONIFACE KIHIA MWANGI

T/A BONKI CONSULTANTS.....1ST DEFENDANT/RESPONDENT

GODFREY MWANGI KIHIA.....2ND DEFENDANT/RESPONDENT

R U L I N G

The Plaintiff bank filed a suit before the Milimani Chief Magistrate's Court on 8th October, 2003 in which the Plaintiff sought to recover a sum of money from the Defendants. The cause of action in the case was an interest in land. The Plaintiff was seeking to recover outstanding loan amounts advanced to the 1st Defendant and guaranteed by the 2nd Defendant through a charge registered under the Registered Land Act. The Plaintiff obtained an ex parte interlocutory judgment against both Defendants in the sum of 659,933/91, in default of memorandum of appearance and defence.

When the Defendants finally entered appearance, they raised a preliminary objection to the suit on account of jurisdiction, which objection was upheld by the Court. The subordinate court ordered that the matter should be mentioned before a competent court the next time it came up for hearing.

The Plaintiff, may be finding the subordinated court's order difficult to extract, filed a Notice of Motion application under Sections 3A and 18(1) (b) of the Civil Procedure Act and Order L, Rule 1, 2 and 3 of the Civil Procedure Rules.

The Applicant seeks to have the subordinate court's case file withdrawn from the subordinate court and transferred to the High Court Milimani for hearing and final determination. It also seeks an order staying the proceedings before the subordinate court.

Three grounds are cited as the basis of this application.

- (a) THAT the Chief Magistrate's Court has ruled that it lacks the jurisdiction to hear and finally determine this matter.
- (b) THAT it is only fair and just that this suit be transferred to the High Court in Milimani for hearing and final determination.
- (c) THAT the Defendants/Respondents will not suffer any prejudice if the Orders sought herein are granted.

The Application is supported by an affidavit sworn by Advocate from the Plaintiff's Advocates firm, VICTOR OTIENO.

This application is opposed.

The Respondents' Advocate, Lawrence Kimondo, has sworn a replying affidavit dated 29th April 2008.

I have considered the application, the affidavits filed by both parties and submissions by Counsel. The issue before the Court according to Mr. Otieno for the Applicant, is whether it was convenient to the parties and in the interest of justice in order to avoid possibility of undue hardship, to have the suit transferred to the High Court. Mr. Kimondo on the other hand urged that the issue was whether this suit which had been determined by the subordinate court and a decree issued without jurisdiction under Section 159 of Registered Land Act, could be transferred to the High Court.

It is not disputed that the matter before the Chief Magistrate's Court was determined by entry of an *ex parte* judgment, and a decree issued in the principle sum claimed of Kshs.959,933.91, against both Defendants. There is no dispute that the subordinate court lacked jurisdiction under Section 159 of the Registered Land Act to entertain the suit in the first place.

Section 18 (1) (b) of the Civil Procedure Act stipulates as follows:

“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-

(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.”

Mr. Otieno has urged that the suit before the subordinate court was “pending” and not finalized as urged by the Respondents' Advocate, for reason of a pending application filed by the Respondents. I think that Mr. Otieno missed the point. Mr. Kimondo was right. It was not enough to show that the matter was pending. For this Court to transfer the suit to itself, it must be shown that the subordinate court before which the suit was initially filed had jurisdiction to hear it.

Both Advocates have cited the case of KAGENYI vs. MUSIRAMO AND ANOTHER [1968] EA 43. Sir Udo Oduma, CJ, Uganda held:

“(ii) an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it;

(iii) the subject matter of the application on the admission and showing of the applicant had been instituted in a court without jurisdiction and it was therefore incompetent for the case to be transferred to the High Court for hearing and determination.”

The case of Joseph Gitao vs. Waithaka & Others, Milimani Miscellaneous Civil Application No. 53 of 2002 by Mwera, J. holds similar view.

Mr. Otieno relied on the Court's observation at page 45 that the principal matters to be taken into account are those of convenience of the parties and interest of justice among others. These principals are secondary to the all important primary question of jurisdiction. An incompetent suit by reason of being filed before a court which lacks jurisdiction to hear it is void *ab initio* and cannot therefore be transferred

for hearing before another court. The learned trial magistrate lacked statutory jurisdiction to hear the case since Section 159 of the Registered Land Act, which was applicable to the suit, denied the subordinate court jurisdiction to hear the matter. It matters not that the case was partly or fully heard. The filing of the suit in that court was irregular and the subsequent proceedings defective and void. Such proceedings can only be struck off by the subordinate court itself or alternatively on application by any of the Defendants. The High Court can also strike them off.

The application before court was to order a transfer of the Chief Magistrate's case and to order stay of the lower court's proceedings. Both prayers do not lie as this court lacks the jurisdiction to transfer an incompetent suit.

The Respondents have in their submissions urged the court to strike out the proceedings before the Chief Magistrate's Court. There is no proper application before me to enable this court exercise its jurisdiction to strike out the proceedings before the lower court. That request does not lie in the circumstances.

Having come to the conclusions I have of this case, I dismiss the Applicant's application dated 15th April 2008 with costs of the application to the Respondents.

Dated at Nairobi, this 6th day of June, 2008.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Maweu for Mr. Otieno for the Applicant

Mr. Njongoro holding brief Mr. Lawrence Kimondo for the Respondents

WARSAME

JUDGE