



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Civil Appli 1209 of 2006

SAVINGS & LOAN KENYA LTD.APPLICANT

V E R S U S

GEORGE SIRENGO MASAFURESPONDENT

R U L I N G

The Applicant herein seeks (by notice of motion dated 30th October, 2006) an order for withdrawal of **Nairobi CMCC No. 6089 of 2005** from the Chief Magistrate's Court and transfer of the same to this court for trial and determination. The application is essentially brought under section 18 (1) (b) (i) of the Civil Procedure Act, Cap. 21 (the Act). The Applicant is the plaintiff before the lower court. The grounds of the application appearing on the face thereon are, that the lower court ruled on a preliminary objection taken by the Respondent (who is the defendant before the lower court) that it had no pecuniary jurisdiction to hear and determine the suit; that the lower court so ruled on account of the Respondent's defence and counter-claim in the suit; and that it is therefore only fair and just that the order sought be granted. There is a supporting affidavit sworn by one **JAMES E. O. ODWAKO**, the mortgage administration manager of the Applicant. To it are annexed the pleadings in and the ruling of the lower court.

The Respondent has opposed the application as set out in the grounds of opposition dated 21st November, 2006. Those grounds are, that the court lacks jurisdiction to transfer the suit on account of the same having been filed in a court without jurisdiction to try and determine it; that it is not true that the lower court ruled it had no jurisdiction on account of the Respondent's defence and counter-claim; that the application is defective for having been commenced by way of notice of motion; and that there was delay in filing the application which has not been explained satisfactorily.

I have considered the submissions of the learned counsels appearing, including the cases cited. I have also perused the pleadings before the lower court and also the ruling of the Chief Magistrate dated 9th October, 2006.

The learned Chief Magistrate gave the parties 21 days from the date of the ruling within which to take appropriate steps; in default the suit and the counter-claim would stand struck out. The Applicant filed the present application on 30th October, 2006; that was on the 21st day from the 9th October, 2006. The Applicant therefore applied within the time given by the Chief Magistrate. There was thus no delay in bringing the application.

On the issue whether the application has been properly brought by notice of motion, the application is under section 18 of the Act. There is no procedure prescribed in the Civil Procedure Rules for applications under that section. Therefore order 50, rule 1 of the Rules applies. It states:-

“All applications to the court, save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open court.”

The application has therefore been properly brought by notice of motion.

The ruling of the learned Chief Magistrate at the material portion was as follows:-

“On the second line of the objection, there is merit. The genesis of the plaintiff’s claim, it cannot be denied, is a charge over a property governed by the Registered Titles Act. The plaintiff’s claim is not a regular claim over a debt even though the charged security may have been realised. The defendant’s counter-claim itself amply demonstrates the point. This court, by virtue of section 2 of the Registered Titles Act, lacks jurisdiction to entertain the claim in this suit. I uphold the preliminary objection and order the suit stayed, pending corrective steps by the parties. If no steps are taken within 21 days of today’s date the suit and the counterclaim shall stand struck out.....”

It is apparent that the Chief Magistrate ruled that she had no jurisdiction to hear the suit both on account of the claim as presented by the plaintiff and also on account of the counter-claim raised by the defendant. It is not correct for the Applicant to claim that it was the Respondent’s counter-claim that took the suit outside the jurisdiction of the subordinate court.

I have myself perused the pleadings before the subordinate court. Though the Applicant’s claim was one of money, it was the balance due and outstanding upon a loan advanced by it to the Respondent upon a charge over a piece of land registered under the Registration of Titles Act, Cap. 281. The learned Chief Magistrate was therefore correct to observe that the plaintiff’s claim was not a regular claim over a debt. In hearing and determining the suit, the court must of necessity look at the charge instrument and most likely have to interpret certain conditions therein. As far as Cap. 281 is concerned, the court that can deal with the matter is the High Court. See the definition of “**court**” in section 2 of that Act. I therefore respectfully agree with the learned Chief Magistrate that she did not have the necessary jurisdiction to deal with the plaintiff’s claim as presented in the lower court.

It is now established that this court has no jurisdiction to transfer a suit from a court that had no jurisdiction in the first place to hear and determine the suit to a court (including itself) that has jurisdiction. This principle of law was established by the famous Ugandan case of **KAGENYI VS MUSIRAMO AND ANOTHER [1968] E.A. 43**. This case has been cited with approval by various judges of this court. See for instance the case of **CHARLES OMWATA OMWOYO VS AFRICAN HIGHLANDS & PRODUCE CO. LTD, Nairobi Misc. Application No. 308 of 2002 (unreported)**. **The principle of law also appears to have been approved by our Court of Appeal. See the case of KENYA**

CO. LTD VS JOSEPH BOSIRE, Nairobi Civil Appeal No. 72 of 2002 (Unreported).

Nairobi CMCC No. 6089 of 2005 having been filed in a court without jurisdiction to hear and determine it, this court has no jurisdiction to withdraw that suit from that court and transfer it to another court (including itself) that has jurisdiction to hear and determine it. I must therefore refuse this application. It is hereby dismissed with costs to the Respondent. Orders accordingly.

DATED AT NAIROBI THIS 15TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED ON THIS 17th DAY OF AUGUST, 2007