REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 639 OF 2005

BONIFACE WAWERU MBIYU……..…PLAINTIFF/APPLICANT

VERSUS

MARY NJERI ……...…1ST DEFENDANT/RESPONDENT

TAI YUN HWANG…….2ND DEFENDANT/RESPONDENT

RULING

The plaintiff's Notice of Motion dated 4th May, 2005 was brought under sections 18 and 3A of the Civil Procedure Act (Cap.21), Order I rules 1, 2, 3 and 5 and Order XXXIX, rules 1, 2 and 3 of the Civil Procedure Rules. The substantive prayer is that the Court be pleased to order withdrawal and/or transfer of Civil Suit No. 4652 of 2005 now pending before the Chief Magistrate's Court at the Milimani Commercial Courts to the High Court.

The application is premised on the ground that the value of the subject-matter in Civil Suit No. 4652 of 2005 is above the pecuniary jurisdiction of the Chief Magistrate's Court.

Evidence in support of the application is in the depositions of ***Mr. Gachoka Mwangi***, the advocate having the conduct of this matter on behalf of the plaintiff. He avers as follows.

The deponent had filed the instant claim at the Milimani Commercial Courts as CMCC No. 4652 of 2005 on 28th April, 2005. A hearing date was given as 3rd May, 2005 and the deponent was asked to effect service thereof. On the assigned hearing date the deponent, while in Court, was served with a relying affidavit to which was annexed a valuation of the suit premises bearing the figure of Kshs.19,500,000/= as at 1997. The deponent avers that he had received his instructions on 28th April, 2005 from the plaintiff's son who had only considered the purchase price for the suit premises which in 1988 had been Kshs.350,000/=. As the plaintiff who was himself in Court agreed to the 1997 valuation, the deponent formed the opinion that the claim should be withdrawn from the Chief Magistrate's Court and transferred to the High Court, and he made the indication to the Court and to counsel for the defendants. Counsel for the defendants, on that occasion, objected to the plaintiff's intentions and indicated they would seek dismissal of the suit on a preliminary point of law. Counsel for the plaintiff then sought an adjournment to enable him to respond, and CMCC No. 4652 of 2005 was stood over to *18th May, 2005.*

Soon after learned counsel for the plaintiffs sought adjournment on *3rd May, 2005* in the Chief Magistrate's Court, he moved on *4th May, 2005* to file the instant application seeking to withdraw Civil Suit No. 4652 of 2005 and to transfer it to the High Court.

To the plaintiff's application, the 1st defendant filed a notice of preliminary objection, on 5th May, 2005,

in which she asserted that the application was bad in law and was an abuse of the process of the Court; that it was incapable of being transferred; and that it was premature and was vexatious. On 6th May, 2005 the 1st defendant filed grounds of objection stating that there was no competent suit capable of being transferred; and that the preliminary objection on jurisdiction must be heard first before the application for transfer of the suit could be heard.

Learned counsel, ***Mr. Mwangi,*** submitted that his application under section 18 of the Civil Procedure Act (Cap.21) was perfectly in order, to facilitate the hearing of the matter on the merits. He contended that it would be a cost-effective arrangement to transfer the suit to the High Court, and pleaded, relying on ***Grindlays Bank (K) Ltd. & Another v. George Barbour,*** Civil Application No. Nai 257 of 1995, that the fault was his and ought not to be visited on his client.

Learned counsel, ***Mr. Kibatia,*** however, considered that the fate of the application must turn on a more fundamental question — *jurisdiction.* Had the plaintiff taken the care to file his suit before a Court endowed with jurisdiction? If not, what is the inevitable legal consequence?

In the plaint in CMCC No. 4652 of 2005 it was pleaded (paragraph 10): *"This Court has jurisdiction to hear and determine this matter*." ***Mr. Kabatia*** wondered how it could now be asserted in the plaintiff's application that the Chief Magistrate's Court had no jurisdiction. If that Court had no jurisdiction, counsel submitted, then neither the High Court nor any other Court had powers to transfer the suit.

There is a persuasive authority to guide this matter: ***Kagenyi v. Musiramo & Another*** [1968] E.A. 43. The following passage in the judgement of ***Sir Udo Udoma, CJ*** (Uganda) may be quoted (pp.45-46):

> ***"While it may be argued that since the provisions of s.18 of the Act do not restrict the powers of the High Court in this respect, it is difficult to see how a wrongly constituted suit could be transferred to another Court for trial especially as the jurisdiction of the Court of origin of the suit, which is a fundamental question, is involved****…*
>
> ***"In the result, this application is refused. It is dismissed because the subject matter of the application on the admission and showing of the applicant having been instituted in a Court without jurisdiction, namely, the Court of a magistrate grade II … it is incompetent for this Court to transfer the same to the High Court for hearing and determination."***

Learned counsel stated, correctly, with respect, the principle in ***Kagenyi v. Musiramo*** as being that the High Court lacks powers to transfer a case from one Court to another unless the suit has in the first instance been filed in a Court having jurisdiction to entertain the same.

Mr. Kibatia sought to distinguish the Court of Appeal decision relied on by the plaintiff, ***Grindlays Bank International (K) Ltd. & Another v. George Barbour,*** Civil Application No. Nai 257 of 1995. In counsel's words, "what was in issue [in that case] did not go to the core of the subject-matter; in the present matter, jurisdiction is central."

Mr. Muriungi, learned counsel for the 2nd defendant concurred with the position taken by learned counsel for the 1st defendant. He submitted that there was no competent suit before the Chief Magistrate's Court at the Milimani Commercial Courts, and hence there was nothing to be transferred to this or any other Court.

Counsel further raised a pertinent objection to the plaintiff's application: the supporting affidavit says that counsel for the plaintiff had at some stage obtained instructions from a son of the plaintiff; therefore, how was the verifying affidavit sworn by the plaintiff himself executed? This is a valid question; and it was not in my view, properly addressed by counsel for the plaintiff.

Mr. Muriungi also queried the plaintiff's *bona fides,* in obtaining a hearing date of *18th May, 2005* before the Chief Magistrate, then straight away filing the present application in the High Court: is there an

attempt to circumvent the proceedings before the Chief Magistrate? If so, counsel submitted — and with clear merit, I think — then this would be an abuse of the process of the Court. From the averments in the supporting affidavit, counsel *had sought adjournment at the Chief Magistrate's Court to enable him to prepare for a hearing before that Court on 18th May, 2005;* but *on 4th May, 2005* he seeks audience before the High Court, for *the purpose of withdrawing his cas*e which is pending in the Chief Magistrate's Court. Counsel urged that the plaintiff's application be dismissed.

In his final submissions, learned counsel for the plaintiff did not address the square points of challenge raised on behalf of both defendants; instead he sought to rely on s.60 of the Constitution which bestowed upon the High Court unlimited original jurisdiction in civil and criminal matters, and urged that this Court has powers to correct errors in the trial process, as well as to supervise the conduct of the Courts below.

The outlines of the instant application, with regard to applicable points of law, are well marked, and in my view they lead to the mode of resolution which I will herein set out.

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 also 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.

Secondly and more importantly, is the question of *jurisdiction.* The case relied on by counsel for both defendants is ***Kagenyi v. Musiramo & Another*** (1968) E.A. As this country's legal system is founded on the distinguished common law heritage, it shares much with other countries of that heritage, and definitely so on elemental principles of law such as those relating to jurisdiction. I should state categorically that the Uganda High Court decision in ***Kagenyi*** is as relevant and applicable here as it is in any country of the Commonwealth. The ***Kagenyi*** case, I believe, merits citation more than it has so far been, in the Courts of Kenya; for it carries fundamental principles of law on jurisdiction.

The entry point into any Court proceeding is *jurisdiction*. If a Court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question. In general the High Court is a Court of unlimited "original jurisdiction " (defined in ***Black's Law Dictionary,*** 8th ed (2004) as *"[a] Court's power to hear and decide a matter before any other Court can review the ma*tter"), but this does not mean, as counsel for the plaintiff has urged, that there is no time when this Court is without jurisdiction. Section 60 of the Constitution stipulates: "**There shall be a High Court, which shall be a superior Court of record, an*d* which shall have unlimited jurisdiction in civil and criminal matters**…" While the High Court has unlimited jurisdiction, it is the correct legal position that the legislature, in exercise of its legislative powers, can, where necessary, limit this jurisdiction. Apart from the clear provisions of statute law that may limit the High Court's jurisdiction, there will be principles of law established and recognised by the Court over the years, which define the mode of exercise of that jurisdiction.

I will, in agreement with the decision in ***Kagenyi v. Musiramo,*** state here that *the High Court will decline to assume jurisdiction in relation to any matter which has been filed before a Court or tribunal lacking jurisdiction*. 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 t*ransferred* 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.

This is how I will resolve the plaintiff's Notice of Motion of 4th May, 2005. This application is dismissed with costs to the defendants.

Orders accordingly.

DATED and DELIVERED at Nairobi this 10th day of June, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Mwangi, instructed by M/s. Gachoka Mwangi & Co. Advocates

For the 1st Defendant/Respondent: Mr. Kibatia, instructed by M/s. Kibatia & Co. Advocates;

For the 2nd defendant/Respondent: Mr. Muriungi, instructed by M/s. Muriungi & Co. Advocates