



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC. APPLICATION E 007 OF 2020 (O.S)**

**NAIROBI CITY COUNTY.....APPLICANT**

**-VERSUS-**

**OFFICE OF THE ATTORNEY GENERAL.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant herein has filed and/or lodged the Originating Summons Application dated the 13<sup>TH</sup> Day of August 2020 and same seeks the following Reliefs;

- i. *The suit filed by the Plaintiff/Applicant against the Defendant/Respondent being CMCC 2 of 2003, namely, Nairobi City County vs Attorney General (On behalf of Commissioner of Land) be and is hereby withdrawn from the Chief Magistrate's Court at City Court, Nairobi and be transferred to the Environment and Land Court Milimani, Nairobi for hearing and final determination.*
- ii. *The Plaintiff's name be and is hereby amended to be and read Nairobi City County Government.*
- iii. *Cost of the Application be provided for.*

2. The Subject Application is premised on various grounds which have been enumerated at the foot thereof and same is further supported by the Affidavit of one, Samson Masaba Munikah, who is an Advocate of the High Court of Kenya.

3. The Originating Summons Application was served upon the Respondent, who upon such service proceeded to and filed Grounds of Opposition.

**DEPOSITIONS BY THE PARTIES**

**Applicant's Case**

4. The Applicant herein, through the Affidavit of Samson Masaba Munikah, has averred that same filed and/or commenced Civil proceedings vide Nairobi CMC No. 2 of 2003, between the City Council of Nairobi vs Attorney General, whereby same sought from the Defendant/Respondent herein, the sum of Kshs. 1,473,338,860 only, plus interest at 3% from the 1<sup>st</sup> of January 2003.

5. It is also the Applicant's averment that on or about the 12<sup>th</sup> of May 2003, same amended the Complaint and thus claimed the sum of Kshs. 1,559,248,379.70 Only, with interest at 2% from the 1<sup>st</sup> of January 2003. Besides, the Applicant also sought for cost of the suit.

6. It is further averred, that on or about the 30<sup>th</sup> of July 2015, the Plaintiff, namely, the Applicant herein, again amended the Complaint in respect of which same now sought for Kshs. 2,089,170,092.05 only, plus interest at 3% with effect from 1<sup>st</sup> of January 2015. Besides the Applicant also sought for costs.

7. The Applicant has thus averred that same has now realized that the Chief Magistrate's Court, before which the suit was filed does not have the requisite Monetary jurisdiction. Consequently, the Applicant now seeks that the suit in the Subordinate Court, be withdrawn and transferred to this Honorable Court for hearing and determination.

## The Respondent's Case

8. The Respondents herein filed Grounds of Opposition dated the 16<sup>th</sup> of February 2021, in respect of which same opposed the Application and whereby the Respondent contended that the Application was non-starter and in any event, this Court cannot transfer a suit which was filed in a Court without jurisdiction.

## SUBMISSIONS BY THE PARTIES

9. When the subject Application came up on the 28<sup>th</sup> of October 2021, Counsel Mr. Simiyu who held brief for the law firm of Munikah & Co. Advocates, informed the Court, that the Court had jurisdiction to entertain the subject Application and essentially to transfer the subject suit from the subordinate court to itself, for hearing and determination on merit.

10. On the other hand, Counsel further contended that the provisions of **Section 18 of the Civil Procedure Act, Chapter 21, Laws of Kenya**, has conferred the Honorable Court with unlimited jurisdiction and it was therefore imperative that the Court should rise to occasion and transfer the suit pending before the Chief Magistrates Court.

11. Even though the Respondent filed their grounds of opposition, same however did not file any submissions in opposition to the Application. Nevertheless, having filed grounds of opposition, which are on record, the Honorable Court is enjoined to consider the said grounds in crafting the Ruling.

## ISSUES FOR DETERMINATION

12. Having evaluated the Originating Summons, Supporting Affidavit and submissions in support thereof, and having considered the Grounds of opposition filed by the Respondent, I am of the humble view that the following issues arise for Determination;

- i. *Whether the suit was filed in a Court with the requisite jurisdiction at the onset.*
- ii. *If the suit was filed in a Court without jurisdiction, whether this Honorable Court can transfer such a suit to itself for hearing and determination.*

## ANALYSIS AND DETERMINATION

### Issue Number One

#### *Whether the suit was filed in a Court with the requisite jurisdiction at the onset.*

13. It is common ground that the suit before the Chief Magistrate's Court was first filed on the 31<sup>st</sup> of December 2002, when the Applicant sought for judgment against the Respondent in the sum of Kshs. 1,473,338,860 only, plus interest at 3%.

14. Suffice it to say, at the time when the suit was filed, the jurisdiction of the Magistrate Court was governed by the provisions of the **Magistrate's Act Chapter 10, Laws of Kenya**, which capped the jurisdiction of the Honorable Court. For clarity, the jurisdiction of the various cadres of the Magistrates Court were stipulated by **Section 3 of the Magistrates Act** which states as hereunder;

*“(1) 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:*

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

- (a) 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) a principal magistrate to a sum not exceeding one million shillings;*
  - (d) a senior resident magistrate to a sum not exceeding eight hundred thousand shillings; or*
  - (e) a resident magistrate to a sum not exceeding five hundred thousand shillings.*
- (2) The Resident Magistrate's Court shall have and exercise the same jurisdiction and powers in proceedings concerning claims under customary law as is conferred on district magistrates under section 9(a).”*

15. From the foregoing provisions, it is apparent and/or evident that the Chief Magistrates Court could only entertain claims of up to a maximum of a claim of Kshs. 3,000,000 and not otherwise.

16. Nevertheless, despite the limited pecuniary jurisdiction conferred upon the Chief Magistrate by dint of Section 3 of the Magistrates Act, the Applicant herein still had the audacity or bravery to file and/or lodge a suit wherein same sought up to Kshs. 2,089,170,092.05 only, before the Chief Magistrates Court.

17. In my humble view, the suit before the Chief Magistrate's Court was filed in a Court without the requisite jurisdiction and consequently the suit was a nullity *ab initio*.

18. On the other hand, the Magistrate's Court before which the suit was filed and wherein same subsists to date, should have proceeded to strike down the suit on account of lack of jurisdiction. Indeed, where jurisdiction does not exist, the Honorable Court is obliged to pronounce itself at the onset and thereafter to Down its tools.

19. In support of the foregoing position, I can do no better than to borrow from the words of the Court of Appeal in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] where the Court stated as hereunder:**

*"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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

20. A court without jurisdiction is obliged to abide by the law and in my humble view, the learned Chief Magistrate should have struck down the subject suit and not to direct the parties to take necessary steps to move the pleadings to a Court without jurisdiction.

21. For clarity, the directions that were made by the learned Chief Magistrate after finding that same was not seized with jurisdiction, were Erroneous.

#### **Issue Number Two**

**If the suit was filed in a Court without jurisdiction, whether this Honorable Court can transfer such a suit to itself for hearing and determination.**

22. Having found and held that the suit that is now sought to be transferred, was filed and lodged in a Court without the requisite jurisdiction, the question that remains to be answered is whether such a suit can indeed be transferred and be imbued with life.

23. Unfortunately, a suit that is filed in a Court without jurisdiction is a nullity *ab initio* and thus same cannot be transferred, either in the manner sought or at all.

24. In support of the foregoing position, I take refuge in the Decision in the case of **Phoenix of E.A. Assurance Company Limited v Simeon Muruchi Thiga t/a Newspaper Service [2019] eKLR** where the Court stated as hereunder;

*"It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was nullity *ab initio* and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. CIVIL APPEAL NO. 6 OF 2018 PHOENIX EAST AFRICA ASSURANCE CO.LTD v. S.M. THIGA T/A NEWSPAPER SERVICES is therefore a nullity as it was based on a nullity."*

#### **FINAL DISPOSITION**

25. I am not sure what may have informed the filing of such a hefty suit, wherein the claim was initially Kshs. 1, 473,338,860 only, in the Subordinate Court, yet the provisions of the Magistrates Act, Chapter 10, Laws of Kenya (now Repealed), were so explicit.

26. Nevertheless, having filed the suit in a Court without jurisdiction, the Applicant herein must now contend with the consequences of such filing. For clarity, the consequence is in black and white, so established and hackneyed.

27. In a nutshell, the inescapable conclusion is that this Honorable Court cannot transfer a suit which was filed in a Court without jurisdiction and which in any event, is a nullity *ab initio*.

28. Consequently, the Originating Summons dated the **13<sup>th</sup> of August 2020**, be and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

In the Presence of;

**June Nafula      Court Assistant**

N/A for the Applicant.

Mr. Motari Senior Litigation Counsel for the Respondent.