



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC MISC APPLICATION NO. 53 OF 2019**

**ERNEST NJUGUNA MWANGI.....APPLICANT**

**=VERSUS=**

**HARRISON KABIRU MUGO.....1ST RESPONDENT**

**CITY CHICKEN & EGGS DEALERS**

**CO-OPERATIVE SOCIETY LIMITED.....2ND RESPONDENT**

**RULING**

1. By a plaint dated 5th June 2018 and filed in the Chief Magistrate Court at Nairobi (Milimani Commercial Courts) as Civil Case Number 5283 of 2018, the applicant instituted a suit against the 1st and 2nd respondents. The suit still subsists in the Magistrate Court. The dispute in the suit revolves around the legality of the sale and transfer of **Land Title Number Nairobi Block 122/134 (the suit property)** to the 1st respondent. The applicant contests the sale and transfer and contends that the sale and transfer were a fraud by the 1st respondent. From the plaint, the alleged purchase price in the impugned sale is said to have been Kshs. 12,000,000/=. Upon being served with summons, the 1st respondent filed in the Magistrate Court an application dated 13/3/2019, together with a certificate of urgency, and a supporting affidavit in which he indicated that the value of the suit property was Kshs. 30,000,000/= and not Kshs.12,000,000/= . The 1st respondent challenged the jurisdiction of the Magistrate Court on that ground.

2. Upon being served with the 1st respondent's application dated 13/3/2019 in which the 1st respondent challenged the jurisdiction of the Magistrate Court, the applicant brought the present miscellaneous application dated 2/4/2019, seeking an order transferring Nairobi CMCC 5283 of 2018 to this court on the ground that there was doubt as to the value of the suit property. During the virtual court session of 25/2/2021, the miscellaneous application was by consent of the parties amended as follows:

***“ a) The top body shall read ELC instead of High Court***

***b) Prayer 1 will read ELC instead of High Court”***

3. The application was supported by the affidavit of the applicant sworn on 2/4/2019, in which he deposed that the 1st respondent had sworn and filed an affidavit in the Magistrate Court deposing that the value of the suit property was Kshs. 30,000,000/=. which was beyond the pecuniary jurisdiction of the Magistrate Court. The 1st and 2nd respondents did not file responses to the said Application dated 2/4/2019.

4. The court directed the parties to dispose the application by way of written submissions. Consequently, the applicant and the 1st respondent filed their respective rival submissions.

5. The applicant submitted that the sale agreement conveying the suit property to the 1st respondent reflected the consideration as Kshs.12,000,000/=. The reflected consideration informed his decision in filing the suit in the Magistrate Court. He further submitted that it was only upon the 1st respondent disclosing the value of the suit property as Kshs. 30,000,000/= that he realized the Magistrate Court did not have pecuniary jurisdiction to adjudicate the dispute.

6. The 1st respondent, in opposition to the application, submitted that the applicant had neither pleaded the value of the suit property nor exhibited a valuation report relating to the suit property. He added that were the court to be inclined to grant the orders sought by the applicant, then that decision were to be based solely on the question of pecuniary jurisdiction and not on any other ground.

7. I have considered the application, the supporting affidavit, and the rival submissions. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination in this application is whether Milimani CMCCC No 5283 of 2018 should be withdrawn and transferred to the Environment and Land Court in Nairobi for hearing and determination in the circumstances of this application.

8. What is the law on pecuniary jurisdiction? **Section 4** of the **Civil Procedure Act (CAP 21)** provides as follows: -

*“Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits, if any, of its ordinary jurisdiction”.*

9. Secondly, **Section 7** of the **Magistrates Court’s Act (2015)** sets the pecuniary jurisdiction of the Magistrate Courts. The limit of pecuniary jurisdiction of the highest magistrate court [ the Chief Magistrate Court] is currently Ksh. 20,000,000/= .

10. The prevailing jurisprudence on the doctrine of jurisdiction is that once a court establishes it does not have jurisdiction to adjudicate a dispute, it has no choice but to down its tools. [ see **Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989)**].

11. In underscoring the centrality of jurisdiction in the adjudication of disputes by our courts, the Supreme Court of Kenya in the case of **Samuel Kamau Macharia v Kenya Commercial Bank (2012) eKLR** stated thus:

*“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings”.*

12. From the evidential materials presented to this court, including the filings in the Magistrate Court in CMCCC No 5283/2018, it does emerge that the value of the suit property was at all material times beyond Kshs 20,000,000/= and therefore outside the pecuniary jurisdiction of the Magistrate Court.

13. Can Milimani CMCC No 5283/2018 be properly transferred to this court in the circumstances of this application? My answer to the above question is in the negative. I say so because it does emerge from the evidential materials placed before this court that from the outset, the Magistrate Court did not have jurisdiction over the dispute. It is trite law that where a suit is filed in a court that does not have jurisdiction, that suit is a nullity and there would be nothing to transfer. The Court of Appeal in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tours & Travel [2016] eKLR** rendered itself on this principle 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 Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with 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 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 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 situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.*

14. The Court of Appeal further rendered itself on this same principle in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** by citing the following principle outlined in the preceding decision in **Joseph Muthee Kamau & another v David Mwangi Gichure & another (2013) eKLR**

*“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being **Kagenyi v Musirambo (1968) EA 43**. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.*

*We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing”*

15. It is therefore my finding that the Magistrate Court at Milimani did not have jurisdiction to hear and determine the suit [ **Nairobi CMCC 5283/2018**] and as a result, the suit was a nullity *ab initio*. A suit filed in a court that lacks jurisdiction is a nullity. There would be nothing to transfer. Consequently, the application dated 2/4/2019, seeking transfer of Milimani CMCC 5283/2018 to this court fails.

16. What then is the remedy available to the applicant? I need not say more than to reiterate the position of the Court of Appeal in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** that:

*“If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction”*

17. Because the respondents did not file a substantive response to this miscellaneous application, there will be no order as to costs.

18. Ultimately, I make the following disposal orders: -

*a) The notice of motion dated 2/4/2019 is dismissed for lack of merit*

*b) Parties shall bear their respective costs of this miscellaneous application.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF JUNE 2021.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Momanyi for the Applicant

Ms Waweru for the Respondent

Court Assistant: June Nafula