



REPUBLIC OF KENYA



**Said v SBM Bank (K) Ltd (Civil Appeal E035 of 2020)  
[2024] KEHC 17088 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17088 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E035 OF 2020**

**DKN MAGARE, J**

**MAY 9, 2024**

**BETWEEN**

**ABDULSWAMAD SAID ..... APPELLANT**

**AND**

**SBM BANK (K) LTD ..... RESPONDENT**

**JUDGMENT**

1. This is an interlocutory Appeal from the Ruling and order of the Honourable Francis Kyambia, Chief Magistrate given on 26/3/2021 in Mombasa CMCC 123 of 2019 the Appellant set forth 5 grounds of Appeal as doth: -
  - a. That the learned Magistrate erred in law and fact by dismissing the Appellant's Notice of Motion application dated 1<sup>st</sup> February, 2019 without considering and properly examining the evidence by the Appellant.
  - b. That the Learned Magistrate erred in law and in fact by failing to acknowledge that statutory notices sent by the Respondent were not received by the Appellant prior to Respondent exercising its statutory power of sale.
  - c. That the Learned Magistrate erred in law and fact by failing to appreciate that the burden of proving whether statutory notices were served upon the Appellant lied with the respondent.
  - d. That the Learned Magistrate erred in law and fact in failing to consider the submission of the Appellant.
  - e. That the Learned Magistrate erred in law by failing to appreciate that the Appellant had satisfied the conditions for grant of temporary injunction.
2. The only issue for determination was whether the Appellant met the criteria for grant of interlocutory injunction. It is lamentable that for 4 years this matter has not proceeded in the lower court due to this



Appeal. The matter first came to me in 24/3/2023. For some reason the file went back to archives. I cannot trace, the preceding that took the file to archives.

3. I prepared this Ruling and noted on the CTS that the file was closed due to a consent order. I returned the file to archives. Later, I discovered that the consent was for HCCA 35 of 2019. Fortunately, this matter was traced and I gave today as a date for judgment.

### **Pleadings**

4. By a certificate of urgency dated 14/12/2021 the Appellant stated that he should be not pay Kshs. 60,422,213.70 which to him was not due. This is after the respondent threatened to sell property being Mombasa/Block XXVI/12. 12, Flat No. 14 2nd Floor, Kizingo area, Mombasa. They stated that they stood to suffer irreparable loss. The subject matter was this a loan of 60,422,213.70.
5. The court below heard the application for injunction and dismissed the same for lack of merit. They raised an issue as to why the court failed to isolate liquidated sum of Kshs. 11,389,375 which is allegedly due and a claim of Ksh. 59,161,253.45 sought by the Respondents.
6. The decision given on 21/2/2020. The memorandum of appeal filed on 5/3/2020 does not indicate which ruling is being appealed. However, the prayer thereof does indicate. He prays that the application dated 1/2/2019 be allowed. That application sought injunction pending hearing of the suit.
7. The notice of motion dated 1/2/2020 was based on the grounds that auditors have found that a sum of 11,393,375.85 was due. The suit property being flat A4(Kizingo) on plot Mombasa/ block XXVI/12 was charged for Ksh 33,234,400.
8. The appellant maintains that he is the registered owner of Plot No. Mombasa/A Block XV /400 which served an overdraft facility. The firm of Anjarwalla paid 5 million. The appellant was disputing money owed that is 15,642,464. He stated that he was willing to settle. He stated that the suit property is matrimonial home. He stated that land parcel No. Mombasa Block XXCVI/ R was charged with 33,234,400 to his utter shock dismay and counter-motion.
9. The dispute therein also related to issues of a statutory power of sale. They admitted that Kshs. 11,393,375. 85 was due as per the auditors. He stated they were to suffer irreparable loss. The court considered submissions filed by the Respondent, the Appellant having neglected to file submissions. The court, found that the Appellant did not settle the debt. He also stated that once property is charged to become a commodity for sale.
10. The court was guided by the locus classicus cases of *Giela v Cassman Brown* [1973] EA 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR.
11. The Court found as fact that all notices were issued and spousal consent obtained prior to charging the land on 18/11/2021. The court found that the Application did not show a prima facie case.

### **Analysis**

12. In an injunction the court considers principles as laid down in the Rules laid out in the locus classicus of *Giela v Cassman Brown* [1973] EA 358, where the court stated as doth: -
13. In this matter the subject matter is a series of loans over properties Mombasa Block XXVI? 12 Mombasa Block XV/400. The Appellant sought the following prayers in his plaint dated 1/2/2020.
  - a. A declaration that the charge dated 6<sup>th</sup> October, 2017 and registered on 16<sup>th</sup> October, 2017 of shillings thirty-three million two hundred and thirty-four thousand four hundred (Kshs.



33,234,400) is null and void due to lack of spousal consent and due to the inflated sum of the principal amount.

- b. An order that the plaintiff's account in the bank be audited by an impartial auditor to determine the exact sum owed.
  - c. An injunction restraining the defendant either by themselves and/or agents, assigns and successor in title from selling, occupying, auctioning, transferring and/or interfering with the quiet possession and occupation by the plaintiff of A4 (Kizingo) on plot No. Mombasa/ Bock XXVI/12.
  - d. Costs of this suit.
14. The application relates to a loan that is admitted to be due and a Notice for Ksh. 33,234,400 given. I do not see where the court erred in finding that there is no prima facie case. To make matters worse, the 1<sup>st</sup> prayer in the plaint is for Kshs. 33,234,400, an amount outside the jurisdiction of the lower court.
15. As at the time of filing defence a sum of Ksh. 49,499,471.55 was said to be due and owing. The dispute was however admitted to be over Ksh. 33,234,400/=.
16. Having the admitted facts in mind, and the prayers sought, it is clear beyond peradventure that the dispute is over Ksh. 33,234,400. The dispute is not over the admitted amount. The Plaintiff cannot by craft desegregate his case in a way that he confers jurisdiction on a court without one. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, THE supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

17. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. Where there is no jurisdiction, the court has no authority to move even an inch. In Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. 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. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:



“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

18. The dispute over Ksh. 33,234,400/= is already pleaded in the plaintiff and an order sought in respect thereof. Under the magistrate’s court act, the highest ranking magistrate has a pecuniary jurisdiction of 20,000,000/=. The subject matter was far beyond the jurisdiction of the court.

19. Therefore, there no case to be heard by the lower court. It is not that there is just no prima facie case but also there is no case as the same is beyond the pecuniary jurisdiction of the court. On the basis of the old edit, where there is no jurisdiction, the court cannot transfer. The case is thus dead on arrival. In *Kagenyi v Musiramu*[1968] EA. 43 at p. 45, the former court for Eastern Arica, sitting in Kampala was of the view that: -

“it is difficult to see how a suit filed without jurisdiction can be transferred especially since the jurisdiction of the court of origin is a fundamental question.”

20. In the court below there was nothing to be determined determine as the court has no jurisdiction. The question them I have to ask myself is the utility of just dismissing the Appeal and leaving the parties to duel on issues already determined. other than rightly dismissing application, the charge that is impugned is valued over 33,234,400. The court ought to have struck out the suit suo moto.

21. This means that there was no prima facie case as understood in the context of the case of *Mrao Ltd v First American Bank of Kenya Ltd& 2 Others* [2003] eKLR, where the court of Appeal stated as follows: -

“4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

22. Without a prima facie case, there is nothing to go to. In the case *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the court of Appela was of the considered view that all the three conditions and stages for grant of injunction are to be handled as as separate, distinct and logical sequences that must be surmounted one after another. Therefore, where there is no prima facie case is not established, then irreparable injury and balance of convenience are not to be considered.

23. The Court is not obligated therefore to move to the other limbs since there was no prima facie case shown. I therefore find that the appeal lacks merit and is accordingly dismissed.

24. Before I depart, I note that the Appellant filed suit in a court without jurisdiction. The court Ksh33,234,400 in the Plaintiff and amounts demanded in the notice. The suit was thus filed in a court without jurisdiction. A case filed in a court without jurisdiction cannot survive. Consequently, the most logical step is to strike out in limine the plaintiff in Mombasa CMCC 123 of 2019 with costs of scale on basis of the subject matter pleaded in the Plaintiff.



25. Section 27 of the *Civil Procedure Act* provides that this court can indicate costs. It provides as Follows: -

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

26. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

27. Noting that the subject matter is in excess of 33,234,400/= an award cost of the Appeal of Ksh. 784,688/=

28. All monies deposited as security be released to the Respondent.

### **Determination**

29. The upshot of the foregoing is that I make the following determination: -

- a. The Appeal lacks merit and is accordingly dismissed with costs of 784,688/=.
- b. Suo moto, the suit in the lower court is struck out having been filed in a court without jurisdiction. Costs to the Respondent herein on scale.
- c. All monies deposited as security pending hearing of this appeal be released to the Respondent.
- d. The file is closed



e. Lower court file be released to the lower court for assessment of costs for the suit.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9<sup>TH</sup> DAY OF MAY, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

M/s A A Said Company Advocates for parties for the Appellant.

M/s Onyango Oballa and Partners Advocates for parties for the Appellant.

Court Assistant - Brian

**M.D. KIZITO, J.**

