



Toyopet Motors Limited v Good Will Wines & Spirits (Civil Appeal E182 of 2023) [2024] KEHC 5898 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E182 OF 2023
HI ONG'UDI, J
MAY 24, 2024**

BETWEEN

TOYOPET MOTORS LIMITED APPELLANT

AND

GOOD WILL WINES & SPIRITS RESPONDENT

(Being an appeal from the Ruling of Small Claims Court at Nakuru Honourable D.M. Macharia Resident Magistrate in Nakuru SCC No. E450 of 2023, delivered on 25th July 2023)

JUDGMENT

1. This appeal arises from a Ruling and Orders issued in Nakuru Small Claims Court Case No. E450 of 2023. In the said suit, the respondent (who was the claimant) sued the appellant (who was the respondent) for payment of kshs. 900,000/= plus interests. This was repayment of deposit pursuant to a contract for sale of a motor vehicle.
2. In its statement of claim dated June 8, 2023, the respondent stated that it entered into an agreement with the appellant on the November 10, 2022 for sale of a motor vehicle whose purchase price amounted to Kshs. 10,300,000/=. Further, that the respondent herein made a deposit of Kshs. 900,000/= as agreed between them.
3. The respondent stated further that the appellant did not hand over possession of the said motor vehicle because it had neither registration documents nor registration number plates. That the appellant later contacted the respondent and informed it that it had found another buyer but refused to refund the deposit claiming that the same was non-refundable. It added that the appellant continued to evade and ignore all efforts by it to recover the sum advanced to it.
4. The appellant filed a response to the statement of claim together with a preliminary objection dated July 13, 2023. The trial court in its ruling delivered on July 25, 2023 found that the preliminary objection lacked merit and the same was dismissed.



5. The appellant being aggrieved by the whole ruling lodged this appeal on August 2, 2023 setting out the following grounds:
 - i. That the learned trial magistrate/adjudicator erred in law and fact in failing to appreciate that the subject matter of the claim was a contract (compliance, interpretation and enforcement) the value whereof of Kshs. 10,300,000/= and the payment of deposit sought was in part performance thereof.
 - ii. That learned trial magistrate/adjudicator erred in law in erroneously assuming jurisdiction to assist the claimant resale from or abdicate a binding agreement under which he had obligations.
 - iii. That the learned trial magistrate/adjudicator erred in law in failing to appreciate that his jurisdiction flows and or arises from the subject matter and not part thereof.
 - iv. That the learned trial magistrate/adjudicator erred in law in assuming and holding that jurisdiction is determinate upon evaluation of evidence when jurisdiction is a preliminary issue that the court must determine first before embarking on receiving and evaluating the evidence.
6. The appellant urged the court to set aside the ruling delivered on 25th July 2023 and the primary suit be transferred to the correct court with the pecuniary jurisdiction for hearing and determination. They also prayed that the respondent be ordered to bear the costs of the appeal.
7. The Appeal was canvassed through written submissions.

Appellants submissions

8. The appellant's submissions were filed by the firm of Sheth & Wathigo Advocates and are dated 8th January, 2024. Counsel identified two issues for determination.
9. On the first issue on whether the appeal should be allowed, counsel submitted that any inquiry as to whether the deposit should be refunded or which of the party was in breach of the contract was a pecuniary question of the interpretation and enforcement of the contract as whole which was beyond the pecuniary limit of the small claims court. He placed reliance on the case of *Phoenix of E. A Assurance Company Limited v S.M Thiga t/a Newspaper Service* [2019] eKLR where the court held as follows;

“According to the appellant, the court had no jurisdiction and the suit was a nullity *ab initio* and it could not therefore be transferred to the High Court whether by consent or otherwise. On the other hand, the respondent seems to be saying that the subordinate court had jurisdiction to hear the suit but only award damages that were within its pecuniary jurisdiction, and therefore the suit was transferable to the High Court.
19. We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate



court could not therefore entertain the suit and allow on! that - art of the claim that was within its pecuniary jurisdiction.”

10. On the second issue on whether the preliminary objection was properly before court, counsel submitted that the appellant’s objection to the jurisdiction of the trial court was premised on the fact that the respondent was seeking interpretation and enforcement of an agreement beyond the pecuniary limit of the said court. Further, that jurisdictional challenge was a pure point of law. He placed reliance on the case of *JN & 5 others v Board of Management of St. G School Nairobi and another* [2017] eKLR, where the court held as follows;

“A point of law is a question that must be answered by applying relevant legal principles to interpretation of the law and such a question is distinct from a question of fact which must be answered by reference to facts and evidence as well as inferences from those facts. To answer to a question of fact usually depends on particular circumstances or factual situations.”

11. She urged the court to find that the appellant’s notice of preliminary objection was properly before court as the same was taken on a pure point of law. She added that the learned magistrate was wrong in dismissing the said preliminary objection and therefore urged the court to allow the appeal with costs to the appellant.

Respondent’s submissions

12. The respondent’s undated submissions were filed by the firm of Mirugi Kariuki Advocates on December 18, 2023. Counsel identified two issues for determination.
13. On the first issue on whether the appeal has merit, counsel submitted that the statement of claim expressly stated that the claim was for money held and received amounting to kshs. 900,000/=. Counsel submitted further that the appellant failed to prefer any counterclaim surpassing the pecuniary jurisdiction of the small claims court. Further, that the trial court confined its scrutiny solely to the claimed amount. The court’s attention was drawn to the case of *Alcott Wiz Trading Co. Ltd & 2 others v Jotun (K) Limited* (Miscellaneous Application E091 of 2023) [2023] KEHC 2742 where the high court opined as follows;

A counterclaim is for all intents and purposes a separate suit and by filing a counterclaim that is clearly outside the pecuniary jurisdiction, the applicants invite the court to exercise its peremptory powers to strike out the counterclaim. In addition, Rule 14 of the Small Claims Court Rules gives a respondent who wishes to file a counterclaim whose value exceeds the pecuniary jurisdiction of the court various options. It provides as follows:

- 141) A respondent who has a counterclaim exceeding one million shillings may: -
- a) Abandon that part of the counterclaim exceeding one million shillings,
 - b) Pursue his or her counterclaim in the proceedings and recover the amount not exceeding one million shillings; or
 - c) File a separate claim in the Magistrates’ Court to recover the whole of the amount counterclaim.



(2) A respondent who abandons that part of the counterclaim exceeding one million shillings shall state in his or her response that the amount in question is abandoned. (Emphasis)

14. Lastly, on the issue of costs, counsel submitted that costs followed the event in light of section 27 of the Civil Procedure Act. He urged the court to dismiss the appeal with costs to the respondents.

Analysis and Determination

15. I have carefully perused and considered the grounds of appeal, evidence on record, cited authorities and the law. I have identified one issue for determination which is whether there was any merit in the notice of preliminary objection dated July 13, 2023.
16. The appellant in its submissions argued that any inquiry as to whether the deposit should be refunded or which of the party was in breach of the contract was a pecuniary question of the interpretation and enforcement of the contract as a whole. That the same was beyond the pecuniary limit of the small claims court.
17. The respondent on its part argued that the statement of claim expressly stated that the claim was for money held and received amounting to kshs. 900,000/=. Further, that the appellant failed to prefer any counterclaim surpassing the pecuniary jurisdiction of the small claims court.
18. The learned trial magistrate in his ruling observed that the only issue for determination was whether the deposit paid by the claimant amounting to kshs. 900,000/= should be refunded or not. He went ahead and dismissed the preliminary objection by the appellant upon consideration of all the factors surrounding the case.
19. It is not disputed that the appellant and the respondent entered into an agreement for the purchase of a motor vehicle whose purchase price was kshs. 10,300,000/=. It is also not disputed that the respondent only paid to the appellant a sum of kshs. 900,000/= as deposit for purchase of the said motor vehicle. No other payment was made by the respondent. The respondent was never given possession of the vehicle. The preliminary objection which was the subject of the ruling being appealed against challenged the jurisdiction of the Small claims court since the subject matter of the suit therein was the interpretation and enforcement of an agreement involving kshs.10,300,000.00/=.
20. This court has looked at the statement of claim dated 8th June 2023 filed by the respondent and notes that the relief sought therein is judgment in the sum of kshs. 900,000/= and any interest as the court deems fit. No relief in regard to breach of contract, specific performance or interpretation and enforcement of the contract as whole was sought by the respondent as claimed by the appellant.
21. I have also looked at the response to the claim, by the appellant dated 3rd July 2023. It shows that the appellant failed to pay Kshs 9,400,000/= hence the non-release of the vehicle to it. The appellant is therefore claiming for a forfeiture of the deposit for breach of the motor vehicle sale agreement and a penalty for failure to pay the balance. In actual fact the appellant is not asking to be paid the balance of Ksh 9,400,000/=, for the undelivered motor vehicle.
22. Thus, what the trial court is supposed to address is the claim for Shs 900,000/= which it has jurisdiction to do. Is there any sufficient reason for the appellant to continue retaining it? This is an issue for determination by the trial court. My humble finding is that the learned trial magistrate analysed the law and circumstances surrounding the claim well and arrived at the right conclusion in dismissing the preliminary objection which this court will not interfere with.
23. The upshot is that the appeal lacks merit and is dismissed with costs. The decision by the trial court is upheld.



24. Orders accordingly.

Delivered virtually dated and signed this 24th day of May, 2024 in open court at Nakuru.

H. I. ONG'UDI

JUDGE

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