



Interactive Gaming & Lotteries Limited v Safaricom Limited (Commercial Civil Case E684 of 2021) [2021] KEHC 335 (KLR) (Commercial and Tax) (3 December 2021) (Ruling)

Neutral citation: [2021] KEHC 335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E684 OF 2021**

**DAS MAJANJA, J
DECEMBER 3, 2021**

BETWEEN

INTERACTIVE GAMING & LOTTERIES LIMITED PLAINTIFF

AND

SAFARICOM LIMITED DEFENDANT

RULING

1. What is before the court is a preliminary objection to the suit raised by the Defendant in its Notice of Preliminary Objection dated 13th August 2021 seeking to strike out the suit on the ground that, “This Honourable Court lacks the pecuniary jurisdiction to hear and determine this suit in view of the express provisions of section 7 of the Magistrates’ Court Act No. 26 of 2015.”
2. Both sides have filed written submissions in support of their respective positions. Since the issue for resolution concerns the jurisdiction of this court, there is no dispute that where the court lacks jurisdiction then it should down its tools. If any authority were required to support this proposition, it is the decision of the Court of Appeal in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] eKLR*.
3. It is common ground that in the Plaint dated 14th July 2021, the Plaintiff prays that the Court direct the Defendant to release to it KES. 16,110,119.40 on the allegation that the Defendant deducted and seized the said amounts on account of Value Added Tax (VAT) without either remitting it to Kenya Revenue Authority or to it.
4. The Defendant submits that under section 7 of the *Magistrates Court Act* prescribes the pecuniary jurisdiction of the magistrate courts in civil matters and by section 7(1)(a) thereof, a chief magistrate shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value



of the subject matter does not exceed twenty million. It therefore submits that this suit ought to have been filed in the Magistrates Court to be determined by a Chief Magistrate.

5. In addition, that the Defendant contends that under section 11 of the [Civil Procedure Act](#), every suit must be instituted in the court of the lowest grade competent to try it hence this suit ought to have been filed before the Magistrates Court where the Chief Magistrate is competent to try this case.
6. The Plaintiff's position is that this suit is filed before the court of the lowest grade competent to hear it based on the value of the subject matter which is in excess of Kshs. 20,000,000 and pursuant to Article 165(3)(a) of the [Constitution](#). It states that the value of the subject matter is KES. 16, 110, 119.4 being the principal sum, interest at the rate of 14% from 14th January 2011 until payment in full, costs of the suit and interest on costs and at the time of filing suit, the amount inclusive of interest was KES. 22,554,167.16 and was bound to increase. Counsel cited the decision of the *Court of Appeal in Joreth Ltd v Kigano & Associates [2002] 1 EA 92* where the court held that the for purposes of calculating instruction fees, the court was entitled to calculate the value of the subject matter from the pleadings, judgment or settlement. It also cites *Desai Sarvia & Another v Giro Commercial Bank, Nairobi HCCC No.1847 of 2002 (UR)*, cited with approval in the case of [Municipal Council of Kisumu v Kenya Power & Lighting Company Limited \[2018\] eKLR](#), the court observed that:

It is the plaintiff to decide how it pleads or makes its claim. The important thing is that the interest is part of the plaintiff's claim as instructed to its advocates and the value of the interest is determinable. It is a factor to be taken into account in the assessment of the instruction fees. I therefore hold that the decision by the Taxing Master to the effect that no instruction fees is allowed on interest accruing is not sound in law is not sustainable in principle.

7. In response to the Plaintiff, the Defendant submits that jurisdiction does not operate retroactively, cannot be conferred at the time of delivery of judgment and must exist at the time of filing suit. It cites [Joseph Muthee Kamau & Another v David Mwangi Gichure & Another \[2013\] eKLR](#) as authority for this proposition. It submits that the award of interest on the principal sum is at the sole discretion of the Court in view of the provisions of section 26 of the [Civil Procedure Act](#) hence it cannot form the basis for pleading that this Court has pecuniary jurisdiction to determine the suit when the suit seeks a liquidated sum of Kshs. 16,110,119.40. It urges that in a suit for special damages such as this suit, the liquidated sum sought in the plaint provides the basis for ascertaining jurisdiction.
8. The question for resolution in this matter depends first on whether this court, the High Court has jurisdiction. The civil jurisdiction of the High Court is clearly set out in Article 165(3)(a) of the Constitution which provides that, the High Court shall have, "unlimited jurisdiction in criminal and civil matters." The express grant of jurisdiction to the High Court cannot be taken away except with clear and express words of the Constitution itself. Thus the fact that the Magistrates Court is granted jurisdiction to deal with matters whose value is below KES. 20,000,000.00 does not take away the jurisdiction of the High Court to deal with any civil matter within its jurisdiction.
9. In this respect I agree with the observations of Githua J., in [Dr Selina Vukinu Ambe v Ketan Shashikant Khatri NRB HCCC No. 171 of 2018 \[2020\]eKLR](#), where the court stated as follows:

- (16) The other objection taken by the defendant is that the suit ought to have been filed in the Magistrates' Court which has jurisdiction to hear and determine the plaintiff's claim and not in the High Court. While as I agree with the defendant that Section 11 of the [Civil Procedure Act](#) requires that a suit should be filed in the court of the lowest grade competent to try it, this provision in



my view cannot be used to challenge the civil jurisdiction of the High Court to entertain and determine suits filed before it. Besides the fact that the provision clearly regulates the filing of suits in subordinate courts, it is pertinent to note that the jurisdiction of the High Court is derived from the Constitution of Kenya 2010 which at Article 165 (3) confers on the court unlimited original jurisdiction in both criminal and civil matters.

(17) With reference to the matters at hand, this means that the High Court is constitutionally mandated to hear and determine all civil suits irrespective of their nature or the value of the subject matter. The High Court's jurisdiction being a creature of the constitution which is the supreme law of the land cannot be limited or fettered by any other written law including the Civil Procedure Act. In my view, any statute that would purport to limit the High Court's jurisdiction as conferred by Article 165 (3) would to that extent be unconstitutional by virtue of Article 2 (4) of the Constitution.

10. I too take the position that section 11 of the Civil Procedure Act which provides that a suit shall be instituted in the court of the lowest grade to try it does not take away the jurisdiction of the High Court to try any case within its jurisdiction. The provision is intended to ensure that scarce court resources are utilized optimally by ensuring that suits are filed in the court with appropriate jurisdiction. Moreover, section 11 cannot be read in isolation as section 18(1)(a) of the Civil Procedure Act provides that the High Court, on application of the parties or on its own motion may, "(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same". Thus, if the suit has not been filed in the court of the lowest grade to try, the High Court may transfer the suit to any subordinate court competent to try it.
11. For the reasons I have set out above I reject and dismiss the Defendant's preliminary objection dated 13th August 2021 with costs to the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Nganga instructed by Mbugua Ng'ang'a and Company Advocates for the Plaintiff.

Mr Kiche instructed by TripleOKLaw LLP Advocates for the Defendant.

