



**REPUBLIC OF KENYA**

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

**ELCA CASE NO. 16 OF 2018**

**EAST AFRICA YEARLY MEETING OF FRIENDS.....APPELLANT**

**VERSUS**

**KAIMOSI FRIENDS UNIVERSITY COLLEGE (KAFUCO)....RESPONDENT**

**JUDGEMENT**

The appellant, East Africa Yearly Meeting of Friends (EAYM) being dissatisfied and or aggrieved by the ruling and or orders of the Learned Principal Magistrate in the above matter do appeal the same on the following grounds that:-

1. The learned Principal Magistrate lacked the requisite jurisdiction to dismiss the appellant's suit in the manner he did or at all.
2. The award of costs to the respondent by the learned Principal Magistrate was unlawful and unjustified.
3. The learned Principal Magistrate violated the lawfully established judicial administration system by dismissing appellant's suit at a time when the same was the subject of a pending miscellaneous application for transfer of the same to the High Court in civil Application No. 41 of 2018 before the ELC Kakamega.
4. The learned Principal Magistrate erred in law in relying on contested issues of fact namely the monetary value of the subject matter in dispute in order to finally determine the suit upon a preliminary objection when the general principle of the law is that a preliminary objection cannot be sustained where there is pending discovery to be made.
5. The Learned Principal Magistrate relied upon false and or incorrect evidence introduced by a valuation report of L.P. 1087/3 which property was not the subject of the dispute before him and or was tailored to defeat justice.
6. The ruling and or orders of the Learned Principal Magistrate are unconstitutionally for disregarding the ADR (Alternative Dispute Resolution) mechanism which process was ongoing between the parties and is provided for under Article 159 of the Constitution of Kenya, 2010.
7. The valuation report relied upon by the Learned Principal Magistrate was inadmissible at the time or as far as the houses in dispute were concerned houses which are on the appellant's land without the required instruction and or authority from the appellant owner and or being so authorized by the court which was seized of the matter at the time.
8. The Learned Principal Magistrate acted unjudiciously and in contempt of the High Court which rendered useless Civil Application No. 41 of 2018 then pending before ELC at Kakamega.
9. The learned Principal Magistrate did not understand the real dispute before him and in the end delivered the ruling and or made orders founded on wrong or incorrect principles of the law as a result of which the appellant have suffered gross injustice and or been denied the right of access to justice and the right to have the dispute resolved in a fair and just manner.

The appellant seeks the orders of the honourable judge of this court that:-

- (a) The appeal be allowed.
- (b) The ruling and or orders emanating from the subject ruling be recalled and set aside in whole or vacated in entirety.
- (c) The subject suit be called for hearing by this honourable court or by any other court competent to try the suit so ordered by this honourable court not presided over by the learned Principal Magistrate against whose ruling the appeal was taken.

(d) Costs of this appeal be recovered from the respondent.

This court has considered the appeal and submissions filed therein. The appellant submitted in the appeal that the learned Principal Magistrate violated the lawfully established judicial administration system by dismissing appellant's suit at a time when the same was the subject of a pending Miscellaneous application for transfer of the same to the High Court in Civil Application No. 41 of 2018 before the ELC Kakamega. That he erred in law in relying on contested issues of fact namely the monetary value of the subject matter in dispute in order to finally determine the suit upon a preliminary objection when the general principle of the law is that a preliminary objection cannot be sustained where there is pending discovery to be made. This court has perused the record of appeal and the lower court file. The ruling emanated from a preliminary objection that the lower court lacked jurisdiction to entertain the matter and the Trial magistrate upheld the same dismissing the suit.

In the *locus classicus* on this subject, **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) KLR** the court held that;

*"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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."*

This position was echoed by this Court in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR** when the court held that:-

*"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 S.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 a 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 same.*

*...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer."*

The decision in Lillian 'S' Case as restated by the Supreme Court In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution- Constitutional Application No. 2 of 2011:-

*"The Lillian 'S' case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."*

In Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others- Supreme Court Civil Appeal (Application) No. 2 of 2011, the Supreme Court delivered itself as follows on the issue of jurisdiction:-

*"A court's jurisdiction flows from either the Constitution or legislation or both."*

Dealing with the same issue of jurisdiction, **J B Ojwang, J** (as he then was) in the **Boniface Waweru Mbiyu vs. Mary Njeri & Another** expressed himself as follows:

*"Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court"*

In the case of Abraham Mwangi Wamigwi vs. Simon Mbiriri Wanjiku & Another (2012) eKLR the court held that;

*"The reason advanced by the applicant in seeking the transfer of Nairobi Chief Magistrate's Court Civil Suit No. 229 of 2012 to the High Court is that the value of the disputed parcel of land exceeds the jurisdiction of that Court. This was the same position in **Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others** (supra). I have no reason to depart from the reasoning of the learned Judge in the said decision. Matters of jurisdiction, in my view, cannot be described as technicalities of procedure. They are matters of substance since without jurisdiction the Court cannot be said to be seized of the dispute. Accordingly, lack of jurisdiction cannot be cured either by overriding objective under sections 1A and 1B of the Civil Procedure Act or Article 159(2)(d) of the Constitution. It follows that this application has no merit."*

I find that the Trial Magistrate did not err in fact or in law when he upheld the objection and dismissed the suit. The Trial Magistrate relied

on the evidence before him. He did not have jurisdiction in this matter. In the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (2019) eKLR the court of appeal held that;

*It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a 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*

I see no reason to depart from all these authorities cited above. In the case of Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF JUNE 2020.**

**N.A. MATHEKA**

**JUDGE**