



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.215 OF 2011

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF

VERSUS

BERNARD NYAGAKA OGAR.....1ST DEFENDANT

HAKIKA CO-OPERATIVE SAVIGS & CREDIT SOCIETY LTD.....2ND DEFENDANT

GEORGE OTWORI MIYAKI.....3RD DEFENDANT

JUSTUS MOCHOMBE NYANYUKI.....4TH DEFENDANT

DINABELL MACHERA.....5TH DEFENDANT

RULING

1. By an application dated **24th February 2015**, brought under **Section 1A, 1B, BA and 18** of the **Civil Procedure Act**, the **1st Defendant/Applicant** sought orders for:

1) Spent.

2) That the Honourable Court be pleased to transfer the suit herein for hearing and disposal to the Chief Magistrate's Court at Kisii.

3) That the costs be in the cause.

2. The application was premised on the grounds that:

“(a) The amount claimed by the Plaintiff against the 1st and 2nd Defendant is the sum of Kshs.1,052,500/= and 3,427, 485.80/= respectively and the Chief Magistrate Court has the requisite pecuniary jurisdiction.

(b) The need to consolidate Kisii CMCC No.284 of 2011 filed earlier than the suit herein and CMCC No.249 of 2013 which suits seem to revolve around the same subject matter and the consolidation will therefore thrush all the issues at once.”

3. The application was further supported by the affidavit of the **1st Defendant/Applicant** sworn on **24th February 2015** in which he expounded on the grounds stated in the body of the application.

Applicant's affidavit:

4. In his said affidavit, the applicant states that he had on 2nd September 2011 moved the court vide **Kisii CMCC No.284 of 2011** in a suit filed against the Plaintiff and that before his case before the lower court could be heard, the Plaintiff/Respondent herein filed the present suit at **Milimani Commercial Court Nairobi vide Case No.384 of 2011**, and the trial judge at Nairobi, after hearing submissions by counsels appearing in the matter, transferred the case to Kisii High Court thereby constituting the instant case.

5. The applicant depones that **Kisii CMCC No.284 of 2011** between the Respondent and the applicant herein is still pending and the issues raised before the lower court are the same as the ones in the instant suit and therefore, it would be proper to consolidate the two cases so that all the issues between the parties can be heard and determined at the same time.

6. The applicant further adds that the Chief Magistrate's court is clothed with pecuniary jurisdiction to hear and determine this matter, which is a claim against the 1st and 2nd Defendant for the sum of **Kshs.1,052,500/=** and **Kshs.3,427,485.80** respectively.

Plaintiff/Respondent's replying affidavit:

The replying affidavit in opposition to the applicant's application was sworn on 24th June 2015 by the respondent's Company Secretary one Stephen Kodumbe in which he deponed that the instant suit was filed by the respondent seeking reliefs against the 1st defendant/applicant and 2nd defendant as follows:

(a)The sum of Kshs.1,052,500/= from the 1st Defendant together with interest thereon at court rates from the date of filing suit until payment in full;

(b)An injunction restraining the 1st Defendant whether by himself, his agents and/or servants from handling, withdrawing, transferring from and/or transacting in any manner whatsoever with the funds in the Defendant's bank account number 0480243001 held by the 1st Defendant at the Plaintiff's Kisii Branch unless and until prayer (a) is settled in full.

(c)The sum of Kshs.3,427,485.80 from the 2nd Defendant together with interest thereon at the rate of 25.39% from 16th November 2011 until payment in full;

(d)A mandatory injunction to compel the 2nd Defendant to deliver possession of the second and third motor vehicles for inspection.

8. **Mr. Stephen Kodumbe** narrated the sequence of events that led to the 1st and 2nd Defendant's indebtedness to the Plaintiff and stated that at the request of the 2nd Defendant, the Plaintiff extended hire purchase facilities to the 2nd Defendant to purchase 3 motor vehicles all valued at a total of **Kshs.10,114,232/=**.

9. The plaintiff stated that contrary to the hire purchase agreement, the 2nd defendant acting through its agents, the 3rd and 5th Defendants, purported to sell one of the vehicles registration number **KBE 735E** to the 1st Defendant and the 2nd Defendant, and despite being aware of the plaintiff's interest in the said motor vehicle purported to take an insurance of the said vehicle.

10. The Plaintiff stated that the said motor vehicle was involved in an accident and was written off whereupon 1st Defendant purported to receive the sum of **Kshs.1,052,500/=** as compensation for the said vehicle which compensation was lawfully due to the plaintiff.

11. The Plaintiff has further claimed that the 2nd Defendant fell in arrears of the hire purchase facility to the tune of **Kshs.3,427,485.80** which sum was accruing interest at the rate of **Kshs.25.39%** from 16th

November 2011 which interest will accrue until the suit is finalized.

12. The Plaintiff contended that the lower court lacks the pecuniary jurisdiction to deal with this case as the sum claimed plus interest stood at **Kshs.8,031,293.25** as at 24th June 2015 which sum exceed the jurisdiction of the subordinate court.

13. The Plaintiff further submitted that his prayer for mandatory injunction in the suit to compel the 2nd Defendant to deliver possession of the two remaining vehicles does not fall under the purview/jurisdiction of the lower court.

14. According to the Plaintiff the suit before the lower court and this instant suit raise different issues and seek different prayers, and therefore, cannot be consolidated.

15. The Plaintiff's Company Secretary further stated that following an application dated **8th September 2011**, the proceedings in the lower court case had been stayed pending the hearing and determination of this instant suit and therefore, there would be no conflict between the two cases as the issues common to the two suits will be determined in this suit.

16. The Plaintiff added that the instant application had been brought in bad faith and was meant to obfuscate the issues to be determined by the court and delay the expedient determination of this suit. The Plaintiff sought the dismissal of the applicant's said application.

17. When the application came up for hearing on 8th July 2015, Mr. Bunde for the 2nd, 3rd, 4th and 5th Defendant's informed the court that his client's were not opposing the instant application. Parties then agreed that this instant application be canvassed by way of written submissions.

Applicant/1st Defendant's written submissions:

18. In his submissions filed on 5th November 2015, the applicant submitted that firstly; the Chief Magistrate's Court has pecuniary jurisdiction to hear and determine this instant suit as the total amount claimed comes to **Kshs.4,479,985/=** only and the Chief Magistrate's Court pecuniary jurisdiction stands at the sum of **Kshs.7,000,000/=** only.

19. The applicant further stated that while his suit before the lower court was still pending, the Plaintiff/Respondent filed this instant suit in Nairobi which suit was transferred to Kisii. The applicant submitted that he filed another suit in the lower court being **Kisii CMCC No.249 of 2013** against M/S AFRICA MERCHANT ASSURANCE in respect to a contract of insurance over the same motor vehicle registration number **KBE 735E** in which the insurance has counterclaimed for the sum of **Kshs.1,302,500/=** which sum is also the subject matter of this instant case.

20. The applicant also submitted that the lower court case had not been stayed and that the Plaintiff/Respondent was misleading the court by saying that the lower court case had been stayed.

Analysis and Determination:

21. After perusing the pleadings in this case and the written submissions filed by the parties herein, I find that the main bone of contention between the parties in this instant application is whether or not this suit should be transferred to Kisii Chief Magistrate's Court for hearing and determination, or better still, whether the applicant/1st defendant has made out a case by providing this court with sufficient grounds to transfer this instant suit to the lower court.

22. It is noteworthy that while the applicant, in his affidavit in support of the application appears to allude to the fact that this instant suit ought to be transferred to the lower court because it would then be consolidated with the two other suits before the lower court (*being Kisii **CMCC No.248 and 249 of 2011***) no application was made for such consolidation of the three suits. The applicant merely mentioned the

existence of two other cases before the lower court and therefore going by the principle that parties are bound by their pleadings and since there was no prayer for consolidation of suits, this court will only focus on the prayer for transfer of this suit to the lower court, as such a transfer would not automatically lead to a consolidation.

23. **Section 18 (1)(b)** of the **Civil Procedure Act** under which this application has been filed states as follows:

“18 (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage:

(b) Withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter:-

(i) Try or dispose of the same; or

(ii) Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) Retransfer the same for trial or disposal to the court from which it was withdrawn.”

24. In the case of **David Kabungu –vs- Zikarenga & 4 others Kampala HCCS No.36 of 1995**, Okello J, stated as follows:

“Section 18 (1) (b) of the Civil Procedure Act gives the court the general power to transfer all suits....”

25. The circumstances in the above quoted case however different from the instant case in the sense that in the instant case, the issue is not about a case being in two different geographical locations as in the quoted case. In the instant case the transfer is sought from the High Court in the same location Kisii to a lower court at Kisii.

26. The different scenarios notwithstanding the overriding principle are that while the court can exercise its general power to transfer all suits, the burden lies on the applicant to make out a strong case for the transfer.

27. In the instant case, the respondent/plaintiff has opposed the application on the ground that the lower court would not have pecuniary jurisdiction to grant the orders sought. From the plaintiff’s prayers in the amended plaint filed on **21st January 2013** the orders sought are as follows:

a) The sum of Kshs.1,052,500/= from the 1st Defendant together with interest thereon at court rates from the date of filing suit until payment in full;

b) An injunction restraining the 1st Defendant whether by himself, his agents and/or servants from handling, withdrawing, transferring from and/or transacting in any manner whatsoever with the funds in the Defendant’s bank account number 0480243001 held by the 1st Defendant at the Plaintiff’s Kisii Branch unless and until prayer (a) is settled in full.

c) The sum of Kshs.3,427,485.80 from the 2nd Defendant together with interests thereon at the rate of 25.39% from 16th November 2011 until payment in full;

d) A mandatory injunction to compel the 2nd Defendant to deliver possession of the second and third motor vehicles for inspection;

e) The costs of this suit together with interest thereon at court rates from the date of filing suit until payment in full.

f) Such other and further relief as this Honourable Court may deem just and fit to grant.

28. From the prayers sought in the plaint and the contents of the plaintiff's replying affidavit it has been stated that the amount the plaintiff anticipates to get in the event that this instant case is successful would go beyond the 7 Million jurisdiction limit of the lower court. It is at this juncture worthy to note that the application was filed and argued before the enactment of the **New Magistrates Act 2015** that came into force on **18th December 2015**. **Section 7 (1) (a)** of the said Act provides as follows:

“(1) A magistrate’s court 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 –

a) Twenty million shillings, where the court is presided over by a chief magistrate;”

Clearly, under the said Act, the Respondents fears that the award it expects to get from the court would exceed the former limits of the lower court's jurisdiction of Ksh.7 Million can now be allayed. The Plaintiff had contended that it was expecting an award of **Kshs.8,031,293/25**. I find that the anticipated award would comfortably fall within the new limits of the chiefs Magistrates pecuniary jurisdiction of **Kshs.20,000,000/00**.

29. In the case of **The Owners of Motor Vessel “Lillian S” –vs- Caltex Oil Kenya Limited [1989] KLR I**, it was 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 continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

30. **Section 1A and 1B** of the **Civil Procedure Act**, under which this instant application was brought state as follows:

“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B (1) For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:

(a)The just determination of the proceedings;

(b)The efficient disposal of the business of the Court;

(c)The efficient use of the available judicial and administrative resources;

(d)The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e)The use of suitable technology.”

The overriding objective under the above sections is the attainment of justice.

31. This court is therefore under an obligation to give effect to the overriding objective by striving to ensure that there is efficient disposal of the business of the court. In view of the fact that other related cases are being handled by the lower court, one can say that this instant case would be expedited before the said court.

32. In view of the above and having noted that the lower court now has pecuniary the jurisdiction to grant the orders sought by the plaintiff in this suit, the order that commends itself to me is the order to allow the applicant’s application dated **24th February 2015** with costs to abide the outcome of this case at the lower court.

Dated, signed and delivered in open court this 3rd day of February 2016

HON. W. OKWANY

JUDGE

In the presence of:

Mr. Ochwangi for Kisinga for Plaintiff/Respondent

Mr. Bigogo for Mose Lazarus for Defendant/Applicant

Omwoyo: Court clerk