

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL APPEAL NO. E379 OF 2024

HFC LIMITED.....
APPELLANT

VERSUS

HANNINGTON FESTUS KENDI.....1ST
RESPONDENT
PATRICK SITEKHA SHIHALO.....2ND
RESPONDENT

JUDGMENT

1. This Judgement arises out of the appeal filed by the Appellant. The Appellant is aggrieved that its suit was struck out with costs. The Defendants successfully raised objections to the Appellant’s suit. They persuaded the Trial Court that that the suit ought to have been filed at Eldoret Law Courts which was vested with the territorial jurisdiction.

Background facts

2. The Appellant is the unsuccessful Plaintiff before the Trial Court. The Respondents are the 1st and 2nd Defendants respectively.
3. The Plaintiff/Appellant filed a suit before the Milimani Commercial Courts at the Chief Magistrates Court. It sought to recover an unsecured personal loan facility granted to the 1st Respondent. The 2nd Respondent was the guarantor to the loan.

4. Upon default by the 1st Respondent. The Appellant sought to recover the amount the outstanding said to be Kshs.1,090,402.02 plus costs and interests, from the Respondents.
5. The 1st Respondent by a Notice of Preliminary Objection dated 1st February, 2022 sought to have the suit struck out on the following grounds.
 - 1) *This Honourable Court lacks territorial jurisdiction n to hear and determine this suit.*
 - 2) *That the transaction leading to the cause of action herein happened in Plaintiff's Eldoret Branch.*
 - 3) *That the 1st Defendant resided in Eldoret.*
 - 4) *That the 1st Defendant will be prejudiced if this suit is heard and determined in Milimani Law Court as the same has financial implication on the 1st Defendant.*
 - 5) *That the Defendant prays that this suit be struck out with costs.*
6. The 2nd Respondent equally filed a Notice of Preliminary Objection dated 13/1/2023. It raised several grounds. The one relevant to this Appeal is as follows;

"That the application is in contravention of Section 15 of the Civil Procedure Act and Order 2 Rule 15(1) (a) & (d) of the Civil Procedure Rules."
7. The Preliminary Objections raised were opposed by the Appellant who filed a Replying Affidavit. Ultimately the Preliminary Objections were heard by way of written submissions.

8. By a Ruling delivered on 9/12/2024, the Trial Court found that it lacked territorial jurisdiction to hear and determine the cases. It agreed with the Respondent and proceeded to strike out the suit with costs to the Respondents.
9. Aggrieved the Appellant has filed this Appeal. The same was also canvassed by way of written submissions.

Issues for determination

10. The Court has considered the Record of Appeal filed, the written submissions by the parties and the oral highlights by Counsel for the parties. The Court frames a single issue for determination as follows;
 - a) *Whether the Trial Court was correct in striking out the suit for lack of territorial jurisdiction.*

Analysis

11. This is a first Appeal. This Court is under a duty to re-evaluate and re-analyse afresh the evidence adduced before the Trial Court and draw its own independent conclusions. In doing so, the Court must bear in mind that the Trial Court had the advantage of seeing and hearing the witnesses firsthand — see **Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**.
12. When the jurisdiction of the Court is objected to, the Court has a duty to determine this issue at the earliest. This is because jurisdiction is everything. Without jurisdiction, the Court would be acting in vain and its actions would be void. They would be a nullity. They would mean nothing.

13. The Court reiterates this position held in the *locus classicus* Case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)**;

"Jurisdiction is everything without it a court has no power to move one step. A court of law downs its tools in respect of the matter before it, the measurement it held the opinion that it is without jurisdiction."

a) Whether the Trial Court was correct in striking out the suit for lack of territorial jurisdiction

14. The Appellant submits that the provision of the Civil Procedure Act dealing with territorial jurisdiction is **Section 15** of the Act. That this is a claim that arises out of a contract. That the loan facility letter was issued in Nairobi. The loan account and the contract account were held at Nairobi. For that reason, the suit was properly filed at Nairobi. The Appellant had an opportunity to elect and did elect to file the suit in Nairobi instead of Eldoret.
15. The Appellant submits that it was a misdirection for the Trial Court to hold that since the Respondents resides in Eldoret. The suit had to be filed in Eldoret.
16. The Applicant relies on the **"Explanation 3"** of **Section 15** of the Civil Procedure Act. It reiterated that the loan facility letter emanated from Nairobi. The loan facility was disbursed at Nairobi. The monthly repayments were effected at Nairobi.
17. The Court is now referred to the case of **Wills Owinoy vs. James Godwin Diang'a Ketta (2019) eKLR; Uaso Ngiro Contractors Ltd v Boleyn Magic Wall Pannel Ltd**

(Commercial Case E032 of 2022)); Julius Lekuruito & another v Nottingham Mwangi & another [2020] KEHC 116 (KLR). That it would be unfair to strike out the suit on the grounds of a territorial objection.

18. The 1st Respondent submits that the suit ought to have been filed within the local limits of the Court where the Respondents resident. This being Eldoret and not Nairobi.
19. The 1st Respondent relied upon **Hussein Mohamed Dulle vs. Kenya Port authority [2000] eKLR** and **Thabit Mohamud vs. Takaful Insurance of Africa Ltd [1995] KLR.** That venue and jurisdiction are not mere technical objections.
20. The power to transfer Civil suits from one Magistrate Court to another is vested with the High Court. This is by virtue of **Section 18 of the civil Procedure Act** and **Section 28 of the Magistrates Court Act.** Reliance was placed upon **Hillary Njoroge vs. Mumias Sugar Co. Ltd Civil Suit No. 24 of 2015 (2010) eKLR.**
21. The Court was reminded that any acts it does without jurisdiction amount to nothing. They are a nullity. The decision of **Sammy Some Kosgei Vs. Grace Jepleting Mutai & another [2015] eKLR** was cited as a reference.
22. The 2nd Respondent submitted that when it comes to selecting the forum for filing, the location of the Defendant remains the main consideration. The Court was referred to **Swiss Deli Trade (Panama) Inc v Privamnuts EPZ Kenya Limited [2020] KEHC 10178 (KLR).**
23. It was submitted that filing this suit in Nairobi was forum shopping.

24. To this Court the submissions that suit was filed without a proper resolution by the Directors of the Plaintiff or that the deponent of the Verifying Affidavit had no authority are not for this Appeal. The Trial Court did not sustain this part of the objection. On the other hand, the 2nd Respondent did not file an Appeal when that part of his objection failed. The Court will therefore restrict itself to the objection based on the territorial jurisdiction.

25. To this Court it is important to restate the provisions of **Section 15 of the Civil procedure Act** which states as follows;

15. Other suits to be instituted where defendant resides or cause of action arises

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or

carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or (c) the cause of action, wholly or in part, arises.

26. The time when to raise objections as to the forum or place of suing is provided for by **Section 16 of the Civil Procedure Act.**

16. Objections to jurisdiction

No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice.

27. Therefore, it is important to raise that objection as the first instance as failure to do so, means the objection cannot be raised on appeal.

28. What of a suit which can be filed in either of the places, say either Nairobi or Eldoret? The argument lies in **Section 17 of the Civil Procedure Act** which states as follows;

17. Power to transfer suits which may be instituted in more than one court

Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of

the several courts having jurisdiction the suit shall proceed.

29. Thus, a Defendant aggrieved by the filing of the suit in Nairobi instead of Eldoret, has the option of filing an application to the High Court. It is the High Court that has the authority and mandate to make a determination of which of the two Court having jurisdiction should hear the case. That is either Nairobi or Eldoret.
30. The power of the High Court to transfer cases is set out in **Section 18 of the Civil Procedure Act**. Since no application for transfer was made to the High Court, the Court was not called upon to make a determination of the correct forum in the case before the parties.
31. To this Court, it appears that the dispute arose from a contract of lending and or borrowing. The Appellant makes a strong case that the letter of offer was made in Nairobi. That payments were being effected in Nairobi. On the other hand, the Respondents leans heavily on having this matter heard at their place of residence being Eldoret. This they find as their convenient forum.
32. It is therefore clear that the suit could have been filed at Nairobi where the contract or cause of action arose, or Eldoret where the Respondents reside. The place where the contract is signed or witnessed or attested does not make it the place where the contract was made. The Court is persuaded that for the purposes of this application the contract arose in Nairobi.

33. The Court refers to **EMMA WAMBUI vs MARY ONGEWE [2002] KEHC 214 (KLR)** P.N. Waki J (*as he then was*) stated as follows;

“So that, it is not merely the residence of the Defendant that determines the place of suing in this matter. It seems to me, as submitted by Mr. Mose, that Mary had options to exercise depending on where the contract of sale was made or performance was intended, which as I have stated is not certain. As is stated in Mulla on the Indian Code of Civil Procedure on identical provisions relating to transfer of cases.”

“The plaintiff as arbiter litis or dominus litis has the right to choose any forum the law allows him. This right is subject to control under Sections 22 & 24 (Kenyan Section 17 & 18). The burden lies on the applicant to make out a strong case for transfer. A mere balance of convenience in favour of proceedings in another court is not sufficient ground, though it is a relevant consideration. As a general rule, the court should not interfere unless the expenses and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purpose of working injustice. What the court has to consider is whether the applicant had made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction.”

As I also stated in Mombasa HCCC 20 of 1997 HEINZ ISBRECH -VS- CHARLES NDIGA (UR)

“The courts power to transfer proceedings from one court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the plaintiff has initially chosen should be dealt with or heard or determined by the court most appropriate or suitable for those proceedings. When making or refusing an order of transfer the court will have regard to the nature of the relief sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case.”

34. It seems the Respondents were citing their personal inconvenience as the reason why the suit should have been filed in Eldoret, rather than Nairobi. These grounds can hardly hold water in this day and age. The Court has moved on time. The Judiciary has embraced technology. Most Court business is handled virtually. The Court refers to **Mwiti v Colkland Group Limited & another [2022] KEHC 14 (KLR)** where Mabeya J. stated as follows;

“We now live in the era of online court proceedings and hearings, the applicant and 2nd respondent will be able to participate fully from the comfort of their homes in Nakuru.

Further, no prejudice has been illustrated by the applicant.”

35. The Kenya Judiciary has made tremendous technological advancements that call for litigation online through virtual or digital justice. The Kenyan Online or virtual Courts take a special place of pride in the African Region as part of our Kenyan innovation. We have taken on to virtual Courts as we took on to the Mpesa innovation. Attending Courts virtually is one of those things that now identify us as uniquely Kenyan. It is part of our Digital justice. It is rooted in **Social Transformation through Access to Justice (STAJ)**. When one files documents in the Judiciary portal, it is no longer the same as walking to Kisumu Law Court to file and register a case. You may be doing so from the comfort of your office or home in Kinoo or Mang’u in Kiambu County, or Bombolulu or Bamburi in Mombasa County. It would be absurd to travel all the way to Kisumu to file documents virtually in that Court. The Kenyan Judiciary has made it possible that you no longer have to bear such travel costs. When a Magistrate is sitting in Lodwar to hear a case in Kilifi as a “Mahakama Popote” or virtual justice, the parties could be accessing the Court from different counties of Tana River and Mombasa. They are able to access justice by way of use of technology. This is the Kenyan Judiciary making it possible for parties to access justice.
36. To this Court, a Preliminary Objection as to the choice of forum may not be the way to go, in this digital age. This is more so where there is concurrent jurisdiction, such as in this case. The

Law may have to be relooked so that it can be in tune with the lived realities of the current times.

37. The proper position would have been for the Respondents to have moved to High Court under **Section 17 of the Civil Procedure Act**. The High court after hearing the parties would have determined which of the Courts either Nairobi or Eldoret was best suited to hear the case. Issues like where witness came from, their status e.g. are they vulnerable etc would have come into play. With virtual Courts almost everywhere other conditions may be the work load in a particular situation, digital connecting etc.
38. As matters stand the Court is persuaded that the Trial Court erred in failing to consider that there was concurrent jurisdiction between the Nairobi and the Eldoret Courts. The Appellant having opted to file the suit in Nairobi, it was up to the Respondents to invoke **Section 17 Section of the Civil Procedure Act** and apply for a transfer of the suit. Allowing the Preliminary Objection and striking out the suit, left the dispute between the parties unsolved. The Appellant was shut off from the seat of justice.
39. The Appeal is allowed with costs to the Appellant.

Determination

40. The Appeal is HEREBY allowed in the following terms.
 - a) The Ruling delivered on 9/12/2024 by the Hon. Z.K. Kiboss, RM in the Chief Magistrate Court at Milimani in MCCOMMSU No. E039 of 2022 and all the orders arising therefrom are HEREBY quashed and set aside. They are

replaced and or substituted with an order dismissing the Notice of Preliminary Objection by the 1st Defendant dated 1st February, 2023 and that of the 2nd Defendant dated 13th January, 2023, with costs.

b) The suit that was previously dismissed is **HEREBY** reinstated. The same is to be fixed for a mention before any Magistrate other than the **Hon. Z.K Kiboss**.

c) The costs of the Appeal are awarded to the Appellant

41. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH
DAY OF APRIL, 2026.**

**NJOROGE BENJAMIN. K
JUDGE**

In the presence of: -

Miss Nangila holding brief for Mr. Ngugi for the Appellant.

Miss Kemboi for the 1st Respondent.

Mr. Mukhabani for the 2nd Respondent.

Mr. John Paul -Court Assistant.