



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 76 OF 2019

(FORMERLY HCCC. NO. 5 OF 2019)

VAUXHALL LIMITED.....1ST PLAINTIFF

MARIANGELA BELTRAMI.....2ND PLAINTIFF

KAREN BLIXEN COMPANY LIMITED.....3RD PLAINTIFF

VERSUS

.MTWAPA BAY INVESTMENTS LIMITED.....1ST DEFENDANT

FOR BEYOND AUCTIONEERS.....2ND DEFENDANT

MALINDI AUCTIONEERS.....3RD DEFENDANT

DOLCE CASA PWANI LIMITED.....4TH DEFENDANT

WORK-NO-WORDS AUCTIONEERS.....5TH DEFENDANT

RULING

1. This suit was initially filed at the High Court in Malindi as Civil Suit No. 5 of 2019. In the Complaint filed on 24th June, 2019 the 3 Plaintiffs sought orders of injunction and specific performance as well as certain declarations in regard to a business known as Karen Blixen restaurant situated on Plot No. 10810 Malindi. Filed contemporaneously with the suit was a Notice of Motion application dated 21st June, 2019 in which the Plaintiff sought to be granted temporary orders of injunction pending the hearing and determination of the suit.

2. Subsequently on 27th June, 2019, the 1st Defendant herein by a Notice of Preliminary Objection dated the same day objected to the application and the entire suit on the basis that the High Court had no jurisdiction to deal with the issues raised in the suit and the application.

3. Upon consideration of the Preliminary Objection, the Honourable Justice Nyakundi in a Ruling delivered on 20th September, 2019 agreed that the predominant issues in the matter fell within the jurisdiction of the Environment and Land Court. In view of that finding, the Learned Judge proceeded to order that the suit be transferred to the Environment and Land Court at Malindi for hearing and determination.

4. In accordance with that order, the suit was transferred to this court upon which the Plaintiffs moved to prosecute an application seeking orders of injunction as initially sought in the High Court.

5. Subsequently and by another Notice of Preliminary Objection dated and filed herein on 24th September, 2019, the 1st Defendant asserts as follows: -

“That the Plaintiff’s application and the entire suit is fatally defective, null and void ab initio and the same ought to be struck out with costs in that the Honourable Court has no jurisdiction.

That the jurisdiction of this court is conferred upon it by the Constitution of Kenya under Article 162(2) and the Environment and Land Court Act, 2011.

That the High Court of Kenya vide the Ruling of Hon. Mr. Justice Reuben Nyakundi on 20th September, 2019 was in contravention of Article 165(5)(b) of the Constitution.

That the High Court did not have any jurisdiction to transfer the matter to this Honourable Court.

That from the proceedings in the matter before the High Court Counsel for the Plaintiffs did go on record as agreeing to have the 1st Defendant's Notice of Preliminary Objection sustained."

6. Urging the said Preliminary Objection before me when the matter came up for argument on 9th October, 2019, Mr. Gicharu Kimani, Learned Counsel for the 1st Defendant submitted that the High Court has no jurisdiction to deal with matters contemplated under Article 165(2) of the Constitution.

7. Counsel submitted that this court being a creation of Article 162(2) of the Constitution is equal to the High Court and that the High Court has no basis directing this court on what to do.

8. On the other hand, Mr. Mouko, Learned Counsel for the Plaintiffs submitted that what was before the court was not a proper preliminary objection as envisaged in law. Counsel submitted further that if the argument was that the High Court erred in its Ruling, then the option was for the 1st Defendant to pursue an Appeal which they had filed in the Court of Appeal and not to ask this court to sit on Appeal on the decision of the High Court.

9. The *locus classicus* on matters of jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" -vs- Caltex Oil (Kenya) Ltd (1989) KLR 1** where the Honourable Justice Nyarangi of the Court of Appeal stated thus: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

10. It is not contested that the present proceedings were initially instituted at the High Court at Malindi as HCCC. No. 5 of 2019. Before the matter came up for hearing of an application filed therein inter-partes, Mtwapa Bay Investments Ltd, (the 1st Defendant) filed a Notice of Preliminary Objection contending that the said court had no jurisdiction.

11. In a Ruling delivered on 20th September, 2019, the Honourable Justice Reuben Nyakundi partially allowed the objection and transferred the matter to this court for hearing and disposal. The 1st Defendant herein however contends that notwithstanding the transfer, the proceedings remain a nullity and that this court thereby lacks jurisdiction to entertain an incompetent suit which was transferred to it by a court without jurisdiction.

12. According to the Plaintiffs however, the issues being raised in the Preliminary Objection before me were already the subject of litigation before my brother the Honourable Nyakundi J and were already settled in his determination made on 20th September, 2019 aforesaid. The Plaintiffs accordingly fault the 1st Defendant for asking this court to review the decision of the High Court and/or to sit on Appeal thereon.

13. I have perused the record herein. In their Notice of Preliminary Objection dated 27th June, 2019, the 1st Defendant contended that the High Court in which this suit was first filed lacked jurisdiction to hear and determine the application and the suit before it by virtue of Article 165(5) of the Constitution. That Article provides that: -

"(5) The High Court shall not have jurisdiction in respect of matters –

a)

b) falling with the jurisdiction of the courts contemplated in Article 162(2)."

14. The said Article 162(2) at sub-paragraph (b) gives the Environment and Land Court the exclusive jurisdiction to hear and determine disputes relating to the use and occupation of, and title to land. Upon considering the said Preliminary Objection in light of the provisions of the said Article 162(2)(b), the Learned Judge did determine that the High Court had indeed no jurisdiction to deal with the substance of the issues therein.

15. In the 1st Defendant's Preliminary Objection before me, that was no longer the contention. The 1st Defendant's main grievance in the objection before me relates to the manner in which this court came to be seized of this matter. As I understood their submissions, it is their case that this court lacks the jurisdiction to entertain an incompetent suit transferred to it by a court without jurisdiction.

16. At Page 15 of his Ruling delivered on 20th September, 2019 aforesaid, the Learned Judge observes as follows: -

"In view of the foregoing sentiments, I find that the issues arising in the instant matter are substantially and predominantly related to ownership and occupation of the subject property. The 1st Plaintiff seeks to be declared the bona-fide purchaser of

the suit property hence these issues ought to be decided in view of the applicable land laws.”

17. I think the question this court is now being asked is whether in those circumstances where it had been established that the High Court lacked jurisdiction to handle the issues, the suit could be transferred as was done herein. Dealing with a similar case where a suit was said to have been filed in the wrong forum in **James Davies Njuguna -vs- James Chacha & 3 Others (2013) eKLR**, Havelock J observed as follows: -

“I am guided by Kimaru J in the Bishop Ndungu case in which the Learned Judge quoted from the finding of Ringera J (as he then was) in Omwoyo –vs- African Highlands & Produce Co. Ltd (2002) 1KLR 698 in which he stated....

“That being the case, the sole issue for determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. (In) Wagenyi -vs- Musiramo & Another (1968) EA 48, Sir Udo Udoma CJ held in relation to Section 18 of the Uganda Civil Procedure Act – a provision which is in pari materia with Section 18 of our Code – that an order to transfer a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. In that case the appellant had sought to transfer a suit from the Magistrate’s Court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court. And in the very early case of Mendonca -vs- Rodrigues (1906 – 1980) 2 KLR, Hamilton J held that the High Court did not have power to order a transfer of a suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local jurisdiction of the lower court in which it had been filed. The principle of law to be gleaned from these authorities is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first place in a court which does not have pecuniary and/or territorial jurisdiction to try it.

I agree with the reasoning of the court in the above case. The Applicant cannot apply to transfer a suit which was filed in a court which had no jurisdiction to a court which has jurisdiction. The Applicant cannot purport to cure a mistake which he made when he filed the suit in a court which lacked jurisdiction. It is no excuse that the Applicant, being a layman, had filed the said suit because he was not aware of the court in which he was to file the suit.”

18. The above sentiments were indeed echoed recently by the Court of Appeal sitting in Mombasa in **Equity Bank Ltd -vs- Bruce Mutie Mutuku T/A Diani Tours & Travel (2016) eKLR** where Makhandia, Ouko and M’Inoti JJA., Stated as follows: -

“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 Section 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 incompetent 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 situation. In the same way a court of law should not through what can be termed as Judicial Craftsmanship sanctify an otherwise incompetent suit through a transfer.”

19. The Learned Judges of the Court of Appeal in the Equity Bank case (supra) went on to determine and I concur that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eye of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer.”

20. Quoting from the renowned case of **Macfoy –vs- United African Co. Ltd (1961) 2 ALL ER 1169**, the Learned Judges of Appeal further observed as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse....”

21. I think in light of the foregoing, I need not say more. The application that gave birth to the proceedings before me amounted to nothing but a mere nullity having been filed in a court without jurisdiction.

22. Accordingly, I find merit in the Preliminary Objection and I hereby strike out the suit before me with costs to the 1st Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF NOVEMBER, 2019.

J.O. OLOLA

JUDGE