



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

MISC. No. 440 OF 2017

DAUDI KARANI.....PLAINTIFF

VERSUS

CIGMA BUSINESS CENTRE.....1ST DEFENDANT

NGOTHO COMMERCIAL AGENCIES.....2ND DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 8th September 2017, an application through which the applicant seeks an order that Nakuru CMCC No. 454 of 2014 be withdrawn from the said court and transferred to this court for hearing and disposal. The respondents reacted to the Notice of Motion by filing a Notice of Preliminary Objection dated 29th October 2017 and filed on 31 October 2017 in which they urge the court to strike out the Notice of Motion on the ground that the court has no jurisdiction to have the subordinate court case transferred to itself. This ruling is also in respect of the said Preliminary Objection.

2. The Notice of Motion was filed on 17th October 2017 and is supported by an affidavit sworn by the applicant. It is deposed that the case sought to be transferred was filed on 19th May 2014 and that judgment is sought therein against the respondents for value of stolen goods, loss of business of at least Kshs.20, 000/= per day from 3rd April 2014 until judgment, Kshs.37, 000/= being money stolen from a cash box, costs of the suit and interest. On 5th May 2017, Hon. J. Omido (PM) made an order stating that he does not have jurisdiction to handle the matter based on the prayer for loss of business of at least Kshs.20, 000/= per day from 3rd April 2014 until judgment in full. The order is what triggered the present application.

3. The respondents did not file any replying affidavit. They chose to oppose the application purely on the basis of the preliminary objection. The applicant also filed a supplementary affidavit on 1st December 2017. I will however not consider its contents at this stage as it was filed after the preliminary objection was raised.

4. The application and the preliminary objection were heard through written submissions. Both the applicant's and respondents' submissions were filed on 19th December 2017. I will begin by considering the preliminary objection first. If it is upheld then the matter will rest there. If however it is dismissed then I will proceed to consider the application on the merits.

5. A preliminary objection must be on a pure point of law. If successful, it should be able to dispose of the matter in respect of which it is raised. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, Law JA stated:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

6. The preliminary objection is stated on the following grounds:

1) That this court lacks jurisdiction to have the lower court case transferred to itself for hearing and determination under Section 13 (2) (a) of the Environment and Land Court Act Chapter 12 (A) of the Laws of Kenya.

2) That under Section 13 (2) (a) of Chapter 124 and Article 162 (2) (b) and 166 (1) (b) of the Constitution this is a special court established to deal with Land and Environment cases only but not matters of commercial nature.

3) That the suit sought to be transferred is a nullity ab initio and the High Court cannot transfer nullities to itself.

4) That the High Court has no power to order a transfer of a suit from one Court to another if the original court where the suit was filed had no jurisdiction to entertain the suit.

7. The objection is not on the ground that this court does not have jurisdiction to hear the Notice of Motion. Rather, it is that this court does not have the jurisdiction to transfer the subordinate court case to itself. In other words, the respondents neither seek striking out of the present application nor dispute the jurisdiction of this court to hear the Notice of Motion. They simply take the position that the court does not have jurisdiction to grant the orders sought in the Notice of Motion. The objection goes to the merits of the Notice of Motion and not to the jurisdiction of this court to hear the application. I will therefore treat it as a response to the Notice of Motion and not a preliminary objection. That paves way for me to consider the merits of the Notice of Motion.

8. Pecuniary jurisdiction of a magistrate's court is provided for under Section 7 of the Magistrates' Courts Act, 2015. The section provides:

7. Civil jurisdiction of a magistrate's court

(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;

(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;

(c) ten million shillings, where the court is presided over by a principal magistrate;

(d) seven million shillings, where the court is presided over by a senior resident magistrate; or

(e) five million shillings, where the court is presided over by a resident magistrate.

9. I have already outlined above the prayers sought in the plaint in the case before the subordinate court. At this stage, prayer (b) of the plaint, just like the other prayers, awaits determination at the trial of the case. It is essentially a claim for general damages for loss of business. It is not a liquidated claim. As pleaded, there is nothing that takes it beyond the pecuniary jurisdiction of the subordinate court. The plaintiff will have to establish his case on that particular prayer. If for example he satisfies the court that he is only entitled to loss of use for ten (10) days, the award under that head will be Kshs.200, 000/=, an amount that is within the pecuniary jurisdiction of the learned magistrate. Needless to state, even the figure of Kshs.20, 000/= per day must equally be proven.

10. Further illustration of the fact that the plaintiff's claim as pleaded is not beyond the pecuniary jurisdiction of the learned magistrate can be found upon perusal of the plaintiff's and defendants' pleadings as exhibited in both the supporting and supplementary affidavits. The plaintiff and the 1st defendant have had landlord-tenant relationship, where the plaintiff was the tenant. It appears that the landlord-tenant relationship ended when the 1st defendant re-entered the premises with the assistance of the 2nd defendant. Arising from the matters complained of in both the plaint and the defence and counterclaim, the defendants also claim from the plaintiff a sum of Kshs.168, 990/= being alleged rent arrears. It is thus manifest that the case could go either way. It must not be assumed at this stage that the claim on loss of business will push the matter beyond the pecuniary jurisdiction of the magistrate.

11. In view of the foregoing discussion, it is clear that it was premature for the learned magistrate to hold that he does not have pecuniary jurisdiction in the matter. It must also be borne in mind that the plaintiff, who has all along had the assistance of learned counsel, freely and deliberately chose the subordinate court as the forum for determination of his claim as pleaded. He must be assumed to know the pecuniary jurisdiction of the court. At the conclusion of the case, the subordinate court will award what is proven, subject to its pecuniary jurisdiction.

12. In the circumstances, considering that the only reason why the applicant sought transfer to this court is the magistrate's order that he does not have pecuniary jurisdiction in view of prayer (b) of the plaint, I decline to order transfer to this court. I order that the learned magistrate should continue handling the matter including considering and determining the preliminary objection dated 16th February 2017 and all other issues that have been raised and pending before him.

13. I must add that this ruling only concerns the question of whether prayer (b) of the plaint pushes the claim beyond the pecuniary jurisdiction of the subordinate court and whether that prayer necessitates transfer of the suit to this court. I make no comment on the other jurisdictional issues raised before the subordinate court. I leave those for consideration and determination by the subordinate court. Costs of this application shall be in the cause.

Dated, signed and delivered in open court at Nakuru this 21st day of June 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Ngugi holding brief for Mrs Mukira for the applicant

Ms Karuga holding brief for Mr Karanja for the respondents

Court Assistants: Gichaba & Lotkomoi