



**Nyale & 2 others v Garam Investments Auctioneers & 2 others; NIC Bank Limited (Interested Party) (Environment & Land Case 33 of 2020) [2023] KEELC 8 (KLR) (10 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 8 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 33 OF 2020  
MAO ODENY, J  
JANUARY 10, 2023**

**BETWEEN**

**GEORGE NYALE ..... 1<sup>ST</sup> PLAINTIFF  
PATRICK SULEIMAN FONDO ..... 2<sup>ND</sup> PLAINTIFF  
FRANCIS BAYA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**GARAM INVESTMENTS AUCTIONEERS ..... 1<sup>ST</sup> DEFENDANT  
GEOFFREY TENAI ..... 2<sup>ND</sup> DEFENDANT  
KAAB INVESTMENTS ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**NIC BANK LIMITED ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of a Notice of Motion dated February 1, 2019 by the Interested Party's seeking the following orders: -
  - a. Spent
  - b. That this Honourable Court be pleased to vary and/or set aside the orders issued by this Honourable Court on January 18, 2019
  - c. That the Honourable court be pleased to grant such other or further orders as it may deem just and expedient in the circumstances of this case.
  - d. That the costs of this application be provided for.



## Interested Party's Submissions

2. The Interested Party gave a brief history of the case and stated that the Plaintiff vide a Notice of Motion dated January 18, 2019 seeking for interlocutory injunction restraining the 1<sup>st</sup> Defendant from carrying on with an auction of the suit properties pending the hearing and determination of the of the suit.
3. The Interested Party made an application for joinder into the suit which application was allowed. It was the Interested Party's case that the learned Magistrate issued a temporary injunction restraining the Defendant's herein from carrying out the auction which was to be held on January 21, 2019 outside the Malindi Post Office in respect of Plot Nos 7548, 7550 and 13408 pending the hearing of the Plaintiffs' Notice of Motion dated January 18, 2019 filed in the subordinate Court.
4. The Interested Party further stated that it is aggrieved by the impugned Order on the following grounds: -
  - a. The Honourable Court did not have the jurisdiction to issue the order as the value of the subject matter Suit Property is Kshs 450,000,000.00 /-which was beyond the Honourable Court's pecuniary jurisdiction;
  - b. The impugned Order effectively restrained the Interested Party herein from exercising its statutory power of sale which crystallized upon the 3<sup>rd</sup> Defendant's breach of the terms of the Credit Facility; and
  - c. The impugned Order restrained the public auction of LR No 7548 (CR 28415), LR No 7550 (CR 28414) and LR 13408(CR 50566) yet the ruling and documents which the Plaintiffs have placed reliance on are only in respect of only LR 13408(CR 50566).
5. The Interested Party relied on the supporting Affidavit sworn by Steve Atenya at paragraphs 4 -to-18 dated February 1, 2019. That this application had been previously lodged at the Chief Magistrate's Court under the case citation Malindi CMCC Land Case No 2 of 2019: George Nyale & 3 Others - Versus- Guram Investment Auctioneers & 2 Others and vide an Order dated May 14, 2020, the CMCC suit was subsequently transferred to this Honourable Court and registered under the current case citation which was a clear testament to the subordinate Court's absence of the requisite jurisdiction to have issued the impugned Order.
6. Counsel identified one issue for determination namely whether the subordinate Court was seized of the requisite jurisdiction to issue the impugned Order, and submitted that the well-entrenched position in law that jurisdiction is everything which is derived from the *Constitution*, Statute or in certain instances, a superior Court's judicial pronouncement conferring jurisdiction as appropriate.
7. It was counsel's further submission that it therefore follows that a Court cannot arrogate itself jurisdiction by sympathy or crafty interpretation of the law and relied on the Supreme Court case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR*.
8. Mr Karani also relied on the provisions of Section 7(1) of the *Magistrates' Court's Act, 2015* provides for the pecuniary limits of subordinate courts' jurisdiction.
9. Counsel therefore submitted that it is incontestable that a subordinate Court presided over by a Senior Principal Magistrate cannot exercise its jurisdiction in instances where the value of the subject matter exceeds Kshs 15 million as in the present case the subject matter of the suit was valued at Kshs 450,000,000.00/- as per the Valuation Report, which appears at page 85 of the Application. Further



that the value of the facilities that the 3<sup>rd</sup> Defendant had sought from the Interested Party herein were in excess of Kshs 2.52 Billion as detailed in the Offer Letter which appears at page 12 of the Application.

10. According to Counsel the subordinate Court did not have the pecuniary jurisdiction to hear and issue the impugned orders and that is why the subordinate Court vide a ruling dated May 14, 2020 transferred the suit suo moto to this court.
11. Further that the Plaintiff's themselves vide the Replying Affidavit sworn on February 8, 2019 by Patrick Suleiman Fondo unequivocally admitted that they ought to have filed the present suit in the Environment & Land Court of Kenya, but did not do so because their pleadings did not contain a valuation report which clearly would have shown that the value of the Charged Properties the subject matter of the present proceedings exceeds this Honourable Court's pecuniary jurisdiction.
12. Mr Karani submitted that the orders granted were void ab initio and cited the cases of *Republic Vs Kajiado North District Ngong Land Disputes Tribunal, Senior Resident Magistrate Kadjiado [2014] eKLR* and *Macfoy vs United Africa Co Ltd [1961] 2 ALL ER 1169*.
13. Counsel therefore urged the court to find that the impugned Order is void and a nullity and set aside the same with costs.
14. The Plaintiff admitted in the replying affidavit that they should have filed this suit in the Environment and Land Court.

### **Analysis And Determination**

15. The issues for determination are whether the subordinate Court was seized with the requisite jurisdiction to issue the impugned Order and whether the transfer of the suit to this court was regular taking into account that the court did not have the jurisdiction to hear and determine the suit.
16. The impugned order was issued by a Principal Magistrate whose jurisdiction according to Section 7 of the Magistrates' Court Act was Kshs 15 Million. The Suit Properties were valued as per the valuation report at more than Kshs 450 Million which is way beyond even the Chief Magistrate's jurisdiction of Kshs 20 Million.
17. Section 7 of the Magistrates 'Court provides as follows; -

' 7. Civil jurisdiction of a magistrate's court

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-

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

Fifteen million shillings, where the court is presided over by a senior principal magistrate;

Ten million shillings, where the court is presided over by a principal magistrate;

Seven million shillings, where the court is presided over by a senior resident magistrate; or

Five million shillings, where the court is presided over by a resident magistrate. '



18. It should be noted that jurisdiction is a substantial issue that goes to the very heart of a matter that is before a court, and without jurisdiction a court acts in vain as was held in the case of *The Owners of Motor Vessel 'Lillian S' v Caltex Oil Kenya Limited [1989] KLR* as follows: -

' By jurisdiction is meant the authority which a court has to decide matters that are before it or to take cognisance of matters presented in a formal way for its decision... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.'

19. It follows that the order of injunction that was granted by the Principal Magistrate was without jurisdiction hence null and void.

20. When a court does not have jurisdiction to hear and determine a matter, does it have the jurisdiction to transfer it? In the case of *Kagenyi -vs- Musiramo and Another (1968) EALR 43*, in which the court held that where the subordinate court lacks jurisdiction to determine a matter, one court cannot transfer a suit to another court unless the suit had in the first instance been brought to a court which had jurisdiction to try it. The Plaintiff had also admitted to the lack of pecuniary jurisdiction of the Magistrates Court to hear and determine the matter but it is trite that parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.

21. Similarly, in the Court of Appeal case of *Equity Bank Limited -vs- Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR* stated 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 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 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 a party cannot even seek refuge under the 02 Principal or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.'

22. I have considered the application, the submission by counsel and the relevant judicial authorities and find that the order of injunction issued by the subordinate court was without jurisdiction and is therefore null and void consequently set aside.

23. The court further finds that the transfer of the suit to this court was irregular and this court cannot sanitize an irregularity hence the order transferring this case to this court is also set aside with costs. The parties have other avenues to pursue their remedies.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 10<sup>TH</sup> DAY OF JANUARY, 2023.**

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**M.A. ODENY JUDGE**

**NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due**



**to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.**

