



Intal Plastick Africa (K) Limited v C&S Properies Limited (Commercial Miscellaneous Application E297 of 2023) [2025] KEHC 11730 (KLR) (Commercial and Tax) (30 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11730 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E297 OF 2023**

MN MWANGI, J

JULY 30, 2025

BETWEEN

INTAL PLASTICK AFRICA (K) LIMITED APPLICANT

AND

C&S PROPERIES LIMITED RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 17th April 2023, filed by the applicant pursuant to the provisions of Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Sections 3A & 18(1)(b) of the *Civil Procedure Act*. The applicant prays for orders that Milimani Chief Magistrate's Court Case No. 2308 of 2020 - Ital Plastick Africa (K) Ltd v C&S Properties Limited, be withdrawn therefrom and transferred to this Honourable Court for trial or disposal. The applicant also prays for leave to amend its plaint as per the draft amended plaint annexed to the application, and that it be allowed to serve a supplementary list of documents, witness statements, and bundle of documents.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Winnie Nyakiti, a Director of the applicant company. She averred that the applicant entered into a Lease Agreement with the respondent for Godown No. G22 situate on L.R. No. 12715/214 Bellway Business Park, where the applicant operated its business of importation and manufacture of UPVC windows and doors. She claimed that the applicant single-sourced its raw materials from Italy, but due to the COVID-19 Pandemic severely affecting its Italian suppliers, the applicant struggled to pay full rent in 2019 to 2020. Ms Nyakiti contended that despite partial rent payments and constant communication with the respondent, the latter demanded full payment of a disputed rent amount of Kshs.4,680,720.00 and distressed for rent, leading to the proclamation and auction of the applicant's machinery.



3. Ms Nyakiti stated that the applicant filed Civil Suit No. 2308 of 2020 at the Milimani Chief Magistrate’s Court, seeking orders for injunction and damages. She stated that the applicant’s application for a temporary injunction was declined, allowing the auction of the applicant’s machinery to proceed. She further stated that attempts to stop the aforesaid auction through the High Court were unsuccessful as the auction had already occurred. She averred that in as much as the applicant later appealed, it was advised to pursue reliefs through the original suit. Ms Nyakiti claimed that as a result of the foregoing, the case filed by the applicant faced delays. She asserted that after the auction of the applicant’s machinery, the applicant’s claim shifted primarily to damages, thus exceeding the Magistrates Courts’ pecuniary jurisdiction, thereby necessitating the application herein.
4. In opposition to the present application, the respondent filed a Notice of Preliminary Objection dated 9th June 2023 under the provisions of Article 162(2)(b) of *the Constitution* as read with Section 13(1) & (2)(d) of the *Environment and Land Court Act*, 2016, Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act* and all other enabling provisions of the law, raising the following issues –
 - i. That the Notice of Motion dated 17th April 2023 is a non-starter, fatally defective and grossly incompetent and this Honourable Court lacks the subject matter jurisdiction to hear and determine the said application as it offends the mandatory provisions of Article 162(2)(b) of *the Constitution* as read with Section 13(1) & (2)(d) of the *Environment and Land Court Act*, 2016;
 - ii. That the application is misconceived and an abuse of the Court process and the Court also lacks pecuniary jurisdiction to hear the suit as the purported amended plaint relies on purchase price of machinery in 2015 as opposed to the depreciated value of the machinery as at 2021 which is a matter of Judicial Notice under Sections 59 as read with Section 60(1)(m) & (o) of the *Evidence Act*, Cap. 80;
 - iii. That the alleged purchase price of the machinery as at 2015 is provided as Kshs.18,850,020.00 which sum falls within the pecuniary jurisdiction of the Subordinate Courts as provided in Section 7 of the *Magistrates’ Courts Act*, 2015;
 - iv. That the instant application is an abuse of Court process as it seeks anticipatory orders to transfer a suit that is yet to be filed as Annexure WN-3 is merely an annex and not a substantive pleading duly filed before any Court not even the Subordinate Court to raise a cause of action, it is anticipatory and the Court lacks jurisdiction to issue any order for transfer of an anticipatory (unfiled) suit (sic); and
 - v. The Motion as filed by the applicant seeks to serve selfish interest and amounts to forum shopping an act which ought to be frowned upon as it is an abuse of the Court process and as such, this Motion ought to be dismissed with costs to the respondent.
5. The respondent also filed a replying affidavit sworn on 9th June 2023 by Mr. Sadhu Singh Devgun, a Director of the respondent company. He averred that the relationship between the parties herein is that of a landlord and tenant. He denied the applicant’s allegations about business operations and asserted that rent was to be paid quarterly in advance. He deposed that the applicant defaulted on rent payments starting October 2019, even before COVID-19 became a Pandemic, thus breaching the Lease Agreement between the parties herein. Mr. Devgun contended that the outstanding rent as at September 2020 was Kshs.4,680,270.00. He claimed that they tried to accommodate the applicant with a rent reduction offer during the peak of the COVID-19 Pandemic, but the applicant did not respond, and that due to continued default, the respondent instructed Auctioneers to levy distress for rent, but the applicant frustrated the process, prompting them to seek access orders from Court.



6. Mr. Devgun stated that the applicant later obtained interim orders of injunction restraining the sale by public auction that was scheduled for 22nd June 2020, but continued with the default. He further stated that the applicant filed ELC Appeal No. 041 of 2020 accompanied by an application for stay pending Appeal, but the application for stay was dismissed for lack of merits and the applicant voluntarily withdrew its Appeal. He averred that since the aforesaid appeal was withdrawn, the applicant took no action to prosecute the suit filed at the Magistrates' Court, forcing the respondent to move the Court to have the suit heard and determined. Mr. Devgun contended that the instant application is premature and is an abuse of Court process as it seeks anticipatory transfer orders of a suit that has not yet been formally filed. He asserted that the respondent continues to suffer prejudice from the applicant's serial litigation tactics, which have resulted in unpaid rent and unnecessary legal expenses.
7. The instant application and the respondent's Notice of Preliminary Objection were canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Makonge Francis & Company Advocates on 26th June 2023, 18th July 2023 & 25th July 2023, whereas the respondent's submissions were filed by the law firm of Bansbury Associates Advocates LLP on 14th July 2023 & 24th July 2023.
8. Mr. Onyango, learned Counsel for the applicant relied on the Court of Appeal case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR, and submitted that Article 162(2)(b) of *the Constitution* and Section 13(1) & 2(d) of the *Environment and Land Court Act* do not oust this Court's jurisdiction to hear and determine the instant application, as the applicant's claim is for monetary compensation as a result of the gross undervaluation of its operating machinery during an illegal auction by the respondent's agents and not issues of land, lease, or property rights. He asserted that the dispute between the parties herein is purely commercial in nature and falls within this Court's jurisdiction. Counsel referred to the Court of Appeal case of Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] eKLR, and argued that the accounting issues raised by the respondent fall within this Court's jurisdiction.
9. Mr. Onyango relied on the Supreme Court case of Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 others [2015] eKLR, and contended that the respondent's Notice of Preliminary Objection should be dismissed with costs, as it is based on disputed facts. He cited Section 18(1)(b) of the *Civil Procedure Act* and the case of Hannan Arya Energy (K) Limited & another v Abdullah Gaia Adan [2021] eKLR, and stated that the applicant's original claim for Kshs.4,680,720.00 fell within the Magistrates Courts' jurisdiction, but after the respondent's agents illegally undervalued and auctioned the applicant's machinery, the applicant amended its plaint to seek compensation from the respondent in the sum of Kshs.20,661,908.80, which sum exceeds the Magistrates Courts' pecuniary jurisdiction under Section 7(1) of the *Magistrates' Courts Act*, thus necessitating the instant application.
10. Mr. Onyango cited Section 100 of the *Civil Procedure Act*, Order 8 Rules 3 & 5 of the Civil Procedure Rules, 2010, and the case of Peter Njoroge Kamau v Mburu Mwangi Moses & another [2019] eKLR, and argued that the applicant should be allowed to amend its plaint and file a supplementary list & bundle of documents, and witness statements, so as to ensure fair determination of the dispute between the parties herein. He submitted that although the applicant's claim evolved from seeking injunctive reliefs to damages after the illegal sale of its machinery, the cause of action remains the same. He further submitted that the applicant should not pay fresh filing fees upon transfer of the suit, except for any additional fees arising from new filings, to avoid duplicity and promote affordable, expeditious justice.
11. Mr. Odera, learned Counsel for the respondent submitted that the dispute between the parties herein arises from a Lease Agreement concerning land use, thus falling under the exclusive jurisdiction of



- the Environment and Land Court as per the provisions of Section 13(2)(d) & (e) of the *Environment and Land Court Act*. He cited Article 260 of *the Constitution*, Sections 2, 3(1) (b), 55, 66(1) (a) & Section 105 of the *Land Act* and Sections 3, 2 & 101 of the *Land Registration Act*, and contended that leases involve land occupation and rent obligations, making disputes over leases matters within the jurisdiction of the Environment & Land Court. To buttress his submissions, Counsel relied on the decisions made in *Rachael Chpengeno Komen & 2 others v Mount Kenya University* [2017] eKLR, and *Midland Properties Investment Ltd v Masinde Muliro University of Science and Technology* [2020] eKLR.
12. He submitted that since the applicant's draft amended complaint claims Kshs.8,850,020.00, the suit falls within the Magistrates Courts' jurisdiction under Sections 7(1) and 9(a) of the *Magistrates' Courts Act*, 2015. Mr. Odera referred to the case of *Tabitha Wambui Munyao & 7 others v Peter Ngugi Kainamia & another* [2015] eKLR.
 13. In a rejoinder, Mr. Onyango submitted that the applicant's amended complaint arises from the illegal undervalued sale of its machinery, thus it is legitimately and properly before this Court. He reiterated that Magistrates' Courts previously had jurisdiction to determine the dispute between the parties herein, but lost the said jurisdiction due to the proposed amendments. Counsel maintained that the applicant's case fits within the scope of the provisions of Section 18(1)(b) of the *Civil Procedure Act* and urged this Court to dismiss the respondent's Notice of Preliminary Objection, and grant the orders being sought herein.

Analysis And Determination.

14. Upon consideration of the instant application, the grounds on the face of it, and the affidavit filed in support thereof, the replying affidavit by the respondent and the written submissions filed by Counsel for the parties, the issues for determination are -
 - i. Whether the respondent's Notice of Preliminary Objection should be sustained;
 - ii. Whether Milimani Chief Magistrates' Court Case No. 2308 of 2020 - *Ital Plastick Africa (K) Ltd v C&S Properties Limited* should be withdrawn therefrom and transferred to this Court;
 - iii. Whether the applicant should be granted leave to amend its complaint as per the draft amended complaint annexed to the application herein,
 - iv. Whether the applicant should be granted leave to file and serve a supplementary list of documents, witness statements, and bundle of documents.

Whether the respondent's Notice of Preliminary Objection should be sustained.

15. The respondent submitted that the dispute between the parties herein arises from a Lease Agreement concerning land use, thus falling under the exclusive jurisdiction of the Environment and Land Court as per the provisions of Section 13(2)(d) & (e) of the *Environment and Land Court Act*. He cited Article 260 of *the Constitution*, Sections 2, 3(1)(b), 55, 66(1)(a) & Section 105 of the *Land Act* and Sections 3, 2 & 101 of the *Land Registration Act*, and submitted that leases involve land occupation and rent obligations, making disputes over leases matters within the jurisdiction of the Environment & Land Court.
16. The applicant on the other hand contended that the provisions of Article 162(2)(b) of *the Constitution* and Section 13(1) & 2(d) of the *Environment and Land Court Act* do not oust this Court's jurisdiction to hear and determine the instant application, as the applicant's claim is for monetary compensation as a result of the gross undervaluation of its operating machinery during an illegal auction by the



respondent's agents and not issues of land, lease, or property rights. He asserted that the dispute between the parties herein is purely commercial in nature and falls within this Court's jurisdiction.

17. Upon perusal of the pleadings filed, it is not in contest that the parties herein entered into a Lease Agreement, but the applicant defaulted in its rent repayment obligations. The respondent distressed for rent, leading to the proclamation and auction of the applicant's machinery. Consequently, the applicant filed Milimani Chief Magistrates' Court Case No. 2308 of 2020 against the respondent seeking injunctive reliefs and damages.
18. In order to determine which Court, between the High Court and the Environment & Land Court has the requisite jurisdiction to determine the instant application and by extension the dispute between the parties herein, this Court will have to apply the predominant purpose test and/or dominant issue test. I am cognizant of the Supreme Court's finding in the case of Republic v Karisa Chengo and 2 others SCK Petition No. 5 of 2015 [2017] eKLR, where the Supreme Court emphasized that the High Court, the Environment and Land Court, and the Employment and Labour Relations Court are three different and autonomous Courts which exercise different and distinct jurisdictions. Furthermore, Article 165(5) of *the Constitution* of Kenya, precludes the High Court from entertaining any matters that fall within the jurisdiction of the other two Courts of equal status.
19. The jurisdiction of the *Environment and Land Court Act* is provided for under Section 13 of the Environment & Land Court Act which states that -
 1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes –
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
 3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
 4. In addition to the matters referred to in subSections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
 5. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including ... (Emphasis added)
20. This Court notes that the dispute between the parties herein does not arise from a breach of the Lease Agreement between the parties herein, but from the respondent's proclamation and auction of the



applicant's machinery after levying distress for rent. Further, upon perusal of the applicant's plaint filed at the Magistrates' Court and applying the dominant issue test, it is my finding that the applicant's claim is not in respect to any of the disputes contemplated under Section 13(2) of the *Environment and Land Court Act*. The applicant challenges the respondent's right to levy distress against it for unpaid rent, for locking its tools of trade inside the leased Godown and for attaching and selling the applicant's tools of trade by public auction or otherwise.

21. Further, it is noteworthy that the reliefs sought by the applicant in the plaint filed at the Magistrates' Court include inter alia, a declaration that the intended sale of the applicant's machinery is illegal, a permanent injunction restraining the respondent from selling and/or interfering with the applicant's machinery, an order for the immediate and unconditional release of the applicant's machinery and general damages for loss of goodwill and reputation.
22. Having found that the applicant's claim does not seek any order directly or ancillary to the 'use' of land, I agree with Counsel for the applicant that in applying the dominant issue test, the dispute between the parties herein is purely commercial in nature, which is outside the purview of the Environment & Land Court. I therefore find that this Court has the requisite jurisdiction to hear and determine the instant application.
23. In regard to the Notice of Preliminary Objection, issues (d) to (e) contain disputed facts, such as the value of the applicant's claim and whether or not the applicant's suit filed at the Magistrates' Court can be transferred to the High Court for hearing and determination, which issues cannot be disposed of by way of a Preliminary Objection. It is now well settled that in order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, but it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
24. What constitutes a valid Preliminary Objection was considered by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where the Court stated as follows –

So far as I am 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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
25. In the said case, Sir Charles Newbold P., stated thus-

... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.
26. In the circumstances of this case, it is my finding that the respondent's Notice of Preliminary Objection is not merited. I decline to sustain the same.



Whether Milimani Chief Magistrates' Court Case No. 2308 of 2020 - Ital Plastick Africa (K) Ltd v C&S Properties Limited should be withdrawn therefrom and transferred to this Court.

27. The High Court's power to withdraw and transfer suits instituted in Subordinate Courts is provided for under Section 18 of the [Civil Procedure Act](#) which states as hereunder –

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 -
 - a. transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
 - 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.
2. Where any suit or proceeding has been transferred or withdrawn as aforesaid, the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

28. In the case of *David Kabunga v Zikarega & 4 others* (Kampala HCC No. 36 of 1995) cited by the Court in *GKK v ANK & another* [2021] eKLR, the Court therein laid down the factors to be considered by Courts when dealing with applications for transfer of suits pursuant to the provisions of Section 18 of the [Civil Procedure Act](#) as hereunder -

Section 18 (1) (b) of the [Civil Procedure Act](#) gives the Court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the Court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the 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 expense and difficulties of the trial would be so great as to lead to injustice. What the Court has to consider is whether the applicant has 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... it is well established principle of law that the onus is upon the party applying for a case to be transferred from one Court to another for due trial to make out a strong case to the satisfaction of the Court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the Court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused...

29. The applicant's application to transfer its suit filed in the Magistrates' Court to the High Court is premised on the fact that while the applicant's original claim of Kshs.4,680,720.00 was within the Magistrates Courts' jurisdiction, it now seeks to amend its plaint to include an order for compensation



in the sum of Kshs.20,661,908.80, following an alleged illegal undervaluation and auction of its machinery, which sum now exceeds the Magistrates Courts' pecuniary jurisdiction as provided for under Section 7(1) of the Magistrates' Courts Act.

30. At the time of filing the instant application, the applicant had not amended its plaint filed in the suit before the Magistrates' Courts, which sought for orders inter alia, a declaration that the intended sale of the applicant's machinery is illegal, a permanent injunction restraining the respondent from selling and/or interfering with the applicant's machinery, an order for the immediate and unconditional release of the said machinery, and general damages for loss of goodwill and reputation. It is evident that the parties herein agree that the applicant's suit as per the plaint dated 19th June 2020 is properly before the Magistrates' Court, which Court has the requisite jurisdiction to hear and determine it.
31. It is however worth noting that the instant application is based on proposed amendments to the plaint dated 19th June 2020, which amendments had not been made at the time of filing the instant application. Further, at this juncture it is impossible to ascertain whether or not the applicant will be allowed to amend the said plaint to warrant the filing of an application pursuant to the provisions of Section 18 of the Civil Procedure Act. Having found that the Magistrates' Court has the requisite pecuniary jurisdiction to hear and determine the applicant's suit filed vide a plaint dated 19th June 2020, an application for leave to amend the said plaint ought to have first been filed at the Magistrates' Court seized of the hearing of the said case, and only after being successful, would an application to transfer the suit under Section 18 of the Civil Procedure Act be appropriate. On that issue, I do agree with the argument made by Counsel for the respondent.
32. It is now well settled that Courts generally avoid making orders based on future, uncertain events. In the premise, this Court finds that it is only after the Magistrates' Court has determined whether or not to grant the applicant leave to amend its plaint, that this Court will be seized of the jurisdiction to entertain an application under Section 18 of the Civil Procedure Act.
33. In the end, I find that the applicant has not made out a case to warrant issuance of an order for transfer of Milimani Chief Magistrates' Court Case No. 2308 of 2020, from the lower Court to the High Court, for hearing and determination.
34. In view of the above finding, this Court will not delve into the determination of issues Nos. (iii) & (iv) earlier identified for determination, as issue No. (iii) should be determined by the Magistrates' Court before an application under the provisions of Section 18 of the Civil Procedure Act is made. Thereafter, issue No. (iv) can be dealt with by the Court that will be seized of the hearing of the case.
35. The upshot is that the respondent's Notice of Preliminary Objection dated 9th June 2023 is bereft of merits and it is hereby dismissed. The applicant's application dated 17th April, 2023 was filed prematurely. It is hereby struck out. Each party shall bear its own costs, as none has emerged successful.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 30TH DAY OF JULY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the Presence of:



Mr. Onyango for the applicant

Mr. Odera for the respondent

Ms B. Wokabi – Court Assistant.

Page 4 of 4 NJOKI MWANGI, J.

