



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)**

**CIVIL APPEAL NO. 13 OF 2016**

**BETWEEN**

**EQUITY BANK LIMITED .....APPELLANT**

**AND**

**BRUCE MUTIE MUTUKU T/A DIANI TOUR & TRAVEL ..... RESPONDENT**

*(Being appeals from the ruling and order of the High Court of Kenya at Mombasa (Kasango, J.) dated 30<sup>th</sup> July, 2015 in H.C. Misc. Appl. No. 67 of 2015.)*

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**JUDGMENT OF THE COURT**

The appellant has appealed to this Court against the decision of the High Court sitting at Mombasa (**Kasango, J.**) delivered on 30<sup>th</sup> July 2015. In that decision, the Court ordered that **Kwale PMCC NO. 213 of 2012** (“*the suit*”) be withdrawn from that court and transferred to the High Court at Mombasa for hearing and determination. That decision is now impugned by the appellant on the sole ground that the High Court erred in holding that the suit, though filed in a court lacking jurisdiction, was capable of being transferred in the circumstances of the case. The appellant therefore prays to this Court to set aside the High Court’s decision and substitute the same with an order dismissing the respondents’ Notice of Motion that sought to transfer the suit from the magistrate’s court to the High Court. Further, that this Court be pleased to strike out the suit with costs.

The facts precipitating this appeal are that sometime in 2011, the respondent obtained a loan facility from the appellant of Kshs.5,279,700/- for purposes of purchasing a motor vehicle, a Nissan Patrol. It is undisputed that the actual vehicle’s purchase price turned out to be Kshs.4,500,000/- and so the respondent was paid the extra by the appellant. It is alleged that the appellant on 3<sup>rd</sup> October 2012, repossessed the motor vehicle without any notice to the respondent. The respondent contended that it had been repaying the loan amount promptly and without default up until the time the motor vehicle was repossessed.

Be that as it may, in a bid to have the motor vehicle returned to it, the respondent instituted the suit in the Principal’s Magistrate Court at Kwale. Its other main prayer was for it to be allowed to continue repaying the loan advanced to it as before. The appellant in opposition denied the respondent’s allegations and filed a counter-claim for Kshs.3, 292,874/- from the respondent. This is the amount the appellant alleged the respondent owed it as a result of defaulting in servicing the loan. The appellant pleaded it had the

contractual right to repossess the motor vehicle as a result of the default. Of more relevance to the present appeal however was a preliminary objection filed on 11<sup>th</sup> December 2014 by the appellant against the suit to the effect that the court in which the suit was filed lacked pecuniary jurisdiction to try the suit by virtue of **Section 5 (c)** of the Magistrates Court Act. This was despite the fact that in its defence, it had admitted that the court had jurisdiction to entertain the respondent's suit. Hearing of the preliminary objection was scheduled for 11<sup>th</sup> March 2015 but did not proceed since the court was not sitting that day.

While the determination of the objection was still pending, the respondent filed an application dated 16<sup>th</sup> March 2015 in the High Court to have the suit transferred from the magistrates' court to the High Court for hearing and determination. The application was founded on the ground that the respondent was desirous of amending its claim against the appellant to include a prayer for loss of income which the respondent put at Kshs.20,000/- per day. Therefore according to the respondent, the amendment would have exceeded the pecuniary jurisdiction of the Magistrates' Court in Kwale since at that material time the court did not have a sitting chief magistrate.

In objecting to the application, the appellant deponed that the respondent's application was intended to circumvent the objection it had raised to the suit. Further, that though the High Court had power to transfer suits filed in a subordinate court to the High Court or to another subordinate court with competent jurisdiction, for trial and disposal under **Section 18** of the Civil Procedure Act, that power was not exercisable when the suit to be transferred had initially been filed in a court lacking jurisdiction. Finally, that the intention to claim loss of user and the proposal to amend the Plaintiff was an afterthought on the respondent's part. This was because there was a delay of over two years from when the vehicle was repossessed in October 2012 to when the claim or application was brought in March 2015.

Faced with these set of facts, the High Court agreed readily with the appellant's position that indeed a suit filed in a court without jurisdiction was incapable of being transferred. This was the common thread running in all the authorities relied on by the court. That the court cannot exercise the discretionary power conferred upon it by **Section 18** of the Civil Procedure Act to transfer suits filed in courts lacking jurisdiction to a court with the competent jurisdiction. The High Court was categorical that an incompetent suit was not transferable because, in its words, to transfer it would be to transfer that which lacks life. Having found so, the High Court sought to find out when a suit filed in a court without jurisdiction became a nullity. Was it when the suit was filed, or at the hearing or, at the delivery of the judgment? This is how the Judge delivered herself:-

**“.....An incompetent suit cannot be transferred because to transfer it would be to transfer that which lacks life (sic). Thus far I am in agreement with the respondent's authorities.**

**13. What however I find ought always to be considered by a court facing an application for transfer of suit is, when does a suit become incompetent. Is it when the suit is filed or when it commences hearing or at delivery of Judgement. That question was considered by the Court of Appeal in the case JOSEPH MUTHEE KAMAU & ANOTHER-v-DAVID MWANGI GICHURU & ANOTHER [2013] eKLR. This is what the Court of Appeal stated:**

*‘In the instant case, the subordinate court had jurisdiction subject to the upper limit of the damages being Kshs.300,000/-. We hold that jurisdiction cannot be conferred at the time of delivery of Judgement. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.’*

The High Court placed reliance on the above quoted case and held that the question of jurisdiction can be determined at the commencement of the hearing of the suit. According to the High Court, it would have been premature, at that stage to determine or to hold that the Magistrates' Court in Kwale lacked jurisdiction to try the suit filed before it since that issue could be determined at the commencement of the trial. Counsel for the respondent had argued that the suit was yet to be fixed for hearing and it was thus possible that the Magistrate's Court in Kwale would be presided over by a judicial officer who had requisite jurisdiction to try the suit by the time the suit would be heard. The Judge reasoned that it would create an absurdity if it meant that a suit filed in a magistrate court presided over by a Principal

Magistrate, whose pecuniary jurisdiction was Kshs.4 million, would be rendered incompetent if that magistrate was transferred leaving a resident magistrate, whose pecuniary jurisdiction was Kshs.2 million, to preside over the suit. Despite the foregoing holding, the learned Judge still went ahead to order the transfer of the suit to the High Court. The basis for the transfer is not at all clear.

The parties, by consent canvassed the appeal by way of written submissions. In its written submissions, the appellant urged that the finding by the learned Judge that the suit was yet to be fixed for hearing and by the time it came up for hearing, the Magistrates Court in Kwale may well have a magistrate with the pecuniary jurisdiction to determine the suit meant or could be understood to mean that jurisdiction may be acquired at the hearing of a case. The appellant disputed that finding and submitted that **Joseph Muthee Kamau** (*supra*) relied on by the learned Judge was distinguishable and inapplicable in the circumstances of this case. According to the appellant, the **Joseph Muthee case** was only applicable where the value of the subject matter was at the discretion of the plaintiff to decide. However, where the value of the subject matter was fixed at the inception of the suit, such as in this case, then jurisdiction had to exist at the inception of the suit. The appellant relied on a decision of this Court, differently constituted, in **Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR**, to buttress the point that passage or lapse of time does not confer jurisdiction. The appellant also challenged the Judge's holding that an anticipated availability of a competent judicial officer by the time the suit was fixed for hearing could redeem an otherwise incompetent suit and that by doing so, the learned Judge had created a concept of "anticipated jurisdiction" which should be rejected. The appellant prayed for this Court to strike out the respondent's suit in the subordinate court in line with **Article 159 (2)** of the Constitution which provides for justice to be administered expeditiously, efficiently and affordably.

The respondent in his written submissions supported the High Court's order of transfer. The respondent submitted that the suit in the subordinate court had been filed by the respondent acting in person. Further, that a chief magistrate who had the requisite jurisdiction to hear and determine the suit had now been appointed to serve the Magistrates Court in Kwale. The respondent stated that passage of time had exposed the respondent to damage or loss of user which had outstripped the Magistrate Court in Kwale of jurisdiction and so the situation obtaining at the inception of the suit was no longer tenable. He submitted that the losses accruing to him as a consequence of the appellant's acts could no longer be accommodated in the Magistrates Court. That in his estimation, the loss he had suffered now ran beyond Kshs.7 million which was then the pecuniary limit of the Magistrates Court presided over by a chief magistrate.

According to the respondent, it would be inimical to the interests of justice if he was to forego agitating his enhanced claim merely on account of statutory restrictions on jurisdiction. The respondent also stated that the Magistrates' Courts Act, previously recognized just two cadres of magistrate's court; the District Magistrates Court and the Resident Magistrates Court which according to **Section 3** of the Magistrates' Courts Act was duly constituted when it was presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate. The respondent contended that the pecuniary jurisdiction of the magistrate court had since been enhanced to Kshs.20 million. As such, a claim could only be said to be filed in a court without jurisdiction and thus incapable of transfer where it breached the maximum limit of the pecuniary jurisdiction of that magistrate's court. Further, that under the current Magistrates' Courts Act, where a suit was filed within the pecuniary jurisdiction of the magistrates court but above the jurisdiction of the particular court it is filed in, the court was obliged to direct the parties to apply to the High Court for the suit to be transferred to the nearest court with jurisdiction. Such that a claim for Kshs.5 million should not be struck out merely because the plaint is intitled RMCC but should instead be placed before a Chief or Senior Principal Magistrate for determination.

During the highlighting of the submissions, **Mr. Kongere**, learned counsel for the appellant, submitted that the High Court had looked at the issue of jurisdiction through futuristic lenses as opposed to present lenses and as such, found that by the time the suit came up for hearing, the Magistrates Court in Kwale would be presided over by a judicial officer with competent jurisdiction to hear and determine the appeal. He relied on the authority of **Peter Gichuki Kingara** (*supra*) to buttress the point that jurisdiction cannot lack today and by passage of time exist tomorrow. That jurisdiction is either present *ab-initio* or absent

forever. It was further submitted on behalf of the appellant, that where a party had stated the value of the subject matter, it had to be demonstrated that the court in which the suit was filed had the requisite jurisdiction to determine the issue. That a court acquired jurisdiction at the time of filing of suit and to change the position would herald disaster.

**Mr. Mwakisha**, learned counsel for the respondent, in opposing the appeal conceded that where a suit was filed in a court without jurisdiction, the High Court cannot under **Section 18** order transfer of the suit to another court. However, counsel maintained that the suit was properly filed before the court in Kwale and the basis for seeking the transfer order was for purposes of amending the plaint to include a claim for loss of user. Counsel argued that if the claim exceeded Kshs.7 million, then the Chief Magistrate's Court in Kwale would have lacked jurisdiction since its pecuniary jurisdiction was pegged at Kshs.7 million. However, according to counsel, that was not the situation presently.

The issue falling for determination in this appeal is whether the learned Judge exercised the power granted under section 18 of the Civil Procedure Act judicially. It is to be borne in mind that the court's power to transfer proceedings from one court to another is discretionary. In **Heinz Isbrecht v Charles Ochieng Ndiga (Msa) Misc. Application No. 20 of 1997**, relied on by the appellant, it was held:-

**“When making or refusing an order of transfer the court will have regard to the nature and character of the proceedings, the nature of the relief or remedy 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.”**

As such, this Court can only interfere with the exercise of such discretion, if we are satisfied that it was not exercised judicially. It must be shown that the Judge acted on matters which she should not have acted or failed to take into consideration matters which she should have taken into consideration and in doing so arrived at a wrong conclusion. (See **Mbogo v Shah [1968] EA 93**).

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 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. In **Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another [2012] eKLR**, it was held as follows:-

**“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law.”**

Further, in the case of **Macfoy v United Africa Co LTD [1961] 3 All ER, 1169**, it was held thus:-

**“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...”**

The parties in this matter are not in agreement whether Kwale PMCC NO. 213 of 2012 was filed in a court with or without jurisdiction. The respondent in its submissions however readily concedes that the suit was filed in a court whose pecuniary jurisdiction was at the time pegged at Kshs.4 million though the subject matter of the suit was Kshs.4,500,000/-, but argues that there was at the time of hearing the application, a chief magistrate *in situ* with a pecuniary jurisdiction of Kshs.20,000,000/= who could preside over the case and that the intitlement of the case such as in the Resident Magistrate, in the Senior Resident Magistrate, in the Principal Magistrate, in the Senior Principal Magistrate and in the Chief Magistrate's Court does not by itself confer jurisdiction so that though the case was intitled in the Principal Magistrate's Court, it could still be heard by the Chief Magistrate. We entirely agree with this submission.

Further given the circumstances of this case, the High Court, we think fell into error in holding that the question of jurisdiction could be decided at the commencement of the hearing of the suit. The reason for this being that the question of jurisdiction can be raised at any time of the proceedings and not necessarily at the commencement of the hearing of the suit. The case of **Joseph Muthee** (*supra*) relied on by the High Court to hold that the issue of jurisdiction could be decided at the commencement of the hearing is thus clearly distinguishable and inapplicable in the circumstances of this case. Infact the gist of that decision is in line with all the authorities submitted by the parties, that a suit filed in a court without jurisdiction is a nullity. In that case, the Court delivered itself as follows:-

**“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being the case of Kagenyi v Musirambo [1968] EA 43. The same would apply to pecuniary jurisdiction in a claim of special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction. However, this does not apply to the present case in a claim for general damages where it is the respondents who appointed, through their own assessment, what the amount of damages they would claim. The respondents are permitted to limit the amount of general and special damages they would like to claim in order to bring themselves within the pecuniary jurisdiction of a particular court.”**

Furthermore, it is accepted that a question of jurisdiction should be raised and decided at the earliest possible moment. That the question of jurisdiction once raised should be decided on the material available before court at that time. (See **The Owners of Motor Vessel “Lilian “S” v. Caltex Oil Kenya Limited [1989] KLR 1**). It may suffice to say that the appellant did this by filing a preliminary objection, contemporaneously with its defence and counter claim. The High Court failed, in our view, to appreciate the import of the appellant's preliminary objection. The essence of a preliminary objection was given by **Law, JA and Sir Charles Newbold P. in Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors [1969] EA 696**. The Court held as follows:-

**“...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.”**

In effect, the objection which was based on the sole ground that the magistrate's court lacked pecuniary jurisdiction to try the suit, if upheld, would have disposed of the suit were it not for the respondent's move to the High Court seeking transfer of the same.

The appellant has alleged that the respondent's application for transfer in the High Court was meant to circumvent the appellant's objection to the suit which was still pending determination. Further, that the claim for loss of user was an afterthought as it was being made after a delay of two years from when the vehicle was repossessed in October 2012 to when the claim or application was brought in March 2015. These assertions were in our view not dispelled by the respondent. It may well be true that the respondent by seeking the transfer of the suit on the basis of wanting to amend its claim was calculated to circumvent the appellant's objection and therefore pull the rug under the feet of the respondent. This is not a conduct that can be approved of a party seeking the exercise of the court's discretion in his favour. Indeed, from

the submissions before the High Court, this inference is irresistible. Further, the respondent contended that at the time the application was being prosecuted, a chief magistrate had been posted to Kwale Court with a pecuniary jurisdiction of Kshs.20,000,000/-. So what was the point of entertaining the application when clearly it had been overtaken by events? The High Court should have declined to entertain the application and directed the parties to go back to the Magistrate's Court for the hearing of the suit and or the appellant's preliminary objection. We may further add that the arguments advanced by the parties before the High Court could very well have been advanced before the Kwale Court for and in support of the preliminary objection.

It is for these reasons that we allow the appeal, set aside the ruling and order of the High Court, with the result that the application for transfer of the suit to the High Court is dismissed with costs. The appellant shall have costs of this appeal.

**Dated and delivered at Mombasa this 14<sup>th</sup> day of October, 2016**

**ASIKE- MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**