IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, GATEMBU & SICHALE, JJ.A)

CIVIL APPEAL NO. 244 OF 2010

BETWEEN

PHOENIX OF E.A. ASSURANCE

COMPANY LIMITED.....APPELLANT

AND

S. M. THIGA T/A NEWSPAPER SERVICE.....RESPONDENT

(An Appeal from the Ruling and subsequent Order of the High Court of Kenya at Nairobi (Lesiit, J.) dated and delivered on 8th August, 2008

in

HCCC NO. 248 OF 1997)

****

JUDGMENT OF THE COURT

1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity *ab initio* and any determination made by such court will be amenable to being set aside *ex debito justitiae.* It is for this reason that this Court has to deal with this appeal first as the result directly impacts **Civil Appeal No.6 of 2018** which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

3. On 18th November, 1995, which is well over three decades ago, the respondent's motor vehicle registration No. KUW 164, which was transporting newspapers to various parts of the country was involved in an accident along Naivasha road and as a result it was extensively damaged. It had been comprehensively insured by the appellant vide Policy No. K540269.

4. Following the accident, the respondent reported to the appellant which was supposed to indemnify the respondent for the loss covered under the said policy. The motor vehicle was taken to a garage for repairs but in the meantime, as the respondent was duty bound to distribute the newspapers, he hired another motor vehicle at the daily rate of Kshs. 1,500.00. for that purpose. The motor vehicle was detained at the garage for a total of 1,138 days, slightly over 3 calendar years. When the appellant declined to pay the amount claimed, the respondent filed **PMCC No. 918 of 1991** before the Principal Magistrate's Court at Nairobi vide a plaint dated 18th January, 1991 where particulars of the claim were set out at paragraph 9 as hereunder:-

> ***"The plaintiff's claim against the defendant is for damages for loss of user of the said motor vehicle (as per particulars set out here below) which loss would not have been suffered by the plaintiff had the defendant indemnified the plaintiff timeously in accordance with the terms of the said policy."***

Although the amount claimed was not specified on the face of the plaint, a multiplication of 1,138 days by the daily rate of Kshs.1,500 yields the total amount claimed which was Kshs.1,707,000.00.

5. In its statement of defence dated 18th May, 1991 but filed on 30th July, 1991, while admitting the court's jurisdiction, the defendant (appellant in this appeal) denied the claim.

6. Before the matter was set down for hearing, the respondent filed before the High Court, in Miscellaneous Civil Application No. 167 of 1994, the Notice of Motion dated 13th July, 1993 under **Sections 17** and **18 of Civil Procedure Act**, requesting that the suit, **PMCC No. 918 of 1991** before the Principal Magistrate's Court at Nairobi, be transferred to the High Court for "trial and disposal". The reason given for the application was that the applicant's advocate had "inadvertently" filed the suit before the Principal Magistrate's Court but it had since dawned on him that the aggregate sum "likely to be awarded to the plaintiff in case of success was well over the pecuniary jurisdiction of the Principal Magistrate's Court, which was Kshs.125,000.00."

7. The application was heard exparte by Aluoch J (as she then was) and she gave the order sought on 21st October, 1994 allowing the transfer of the suit to the High Court. From the record of appeal, there are two consent letters dated 12th October, 1999 and 10th March, 2000 relating to HCCC No. 167 of 1994 and HCCC No. 248 of 1994 respectively in which by consent of counsel for both parties, those suits were transferred from the High Court, Central Registry to the High Court Milimani Commercial Law Courts for full hearing and final disposal.

8. Five years later, the respondent applied, by an application dated 14th March 2005, for leave to amend the plaint under Order **V1 A Rules 3, 5,** and **8 of the Civil Procedure Rules**, and **Section 3A of the Civil Procedure Act**. In the proposed amended plaint, the claim was now particularised and other than the prayer for general damages, the special damages claimed amounted to Kshs.4,034,425.00.

9. Upon being served with the application for leave to amended plaint, the appellant filed Grounds of Opposition and a notice of Preliminary Objection raising the issue of lack of jurisdiction and limitation of time. According to learned counsel for the appellant, the suit was incompetent and a non-starter as the same was transferred from a court lacking jurisdiction to hear and determine the same in the first instance. In its the amended defence dated 11th June, 2007 the appellant, while denying the respondent's claims, reiterated that the suit was erroneously transferred from a court without jurisdiction and the High Court did not therefore have jurisdiction to entertain the matter; that the amended plaint was fatally defective as it was filed out of time; and that the amended plaint consisted of amendments with respect to which leave had not been given.

10. In a bid to surmount the challenges, the respondent filed an application on 23rd July 2007 seeking orders that the leave granted on 27th February, 2007 to amend the plaint be enlarged and that the amended plaint dated 23rd April, 2007 be admitted out of time. The respondent did, however, withdraw that application and an order allowing the withdrawal was made by the court on 30th October, 2007.

11. Before the matter was set down for hearing, learned counsel for the appellant filed the Chamber Summons dated 22nd May, 2008 seeking striking out of the amended plaint for the reason that it was *void ab initio* for failure to comply with **Sections 18** and **19 of the Civil Procedure Act**. The fate of an earlier application dated 19th November, 2007 and filed in court on 10th January, 2008 to the same effect is not clear from the record.)

12. The application fell for determination before the learned Judge (Lesiit, J.) who in a Ruling rendered on 8th August, 2008 found *inter alia* that **S.18 of the Civil Procedure Act** was in *pari materia* to **Section 24 of the Indian Civil Procedure Code** and cited the learned editor of **Mulla** on the **Code of Civil Procedure (Act V OF 1908), 13th Edition**, that;

> ***"4. Jurisdiction. An order for the transfer of a suit from one court to another cannot be made under this section unless the suit has been in the first instance brought in a court that has jurisdiction to try it. But, if after the transfer is made, the parties without objection join issue and go to trial upon the merits, the order of transfer cannot subsequently be impeached."***

The above was the position adopted by this Court in **Nyadundo Primary School & Another v. Stephen Waweru CA No. 179 of 1999** (unreported) where the Court held that even where the suit was instituted in a court without jurisdiction, the High Court could transfer it to itself if the parties consent or where the competence of the suit is not questioned. In the above suit, Kwach, JA expressed himself as follows:-

> ***"The order of transfer was apparently made by consent, but had the application by the Plaintiff been contested the learned Judge would have had to decide whether the suit ought to be transferred was incompetent or not for lack of jurisdiction. If the competency of the suit had been questioned, it would have become obvious to the learned Judge that the suit before the Resident Magistrate's Court was incompetent and he would most probably have declined to make the order for transfer but since the order was made by consent and without the benefit of argument, I am satisfied that the Judge had power to transfer the suit to the High Court this latent defect notwithstanding."***

Dismissing the application, Lesiit J found that the subordinate court had jurisdiction to hear the suit in the first instance because the appellant had acquiesced to the transfer as it had not contested the suit at the earliest opportunity, and further that the appellant could not be allowed to impeach the said transfer fifteen (15) years later. The court inferred bad faith on the part of the appellant for the unexplained delay and awarded the respondent costs of the application.

13. That Ruling is the subject of this appeal in which the appellant has proffered 6 grounds of appeal as hereunder:-

> *(i) the Learned Judge erred in both fact and law in dismissing the appellant's chamber summons application dated* ***22nd May 2008*** *with costs;*

*(ii) the Learned Judge erred in both fact and law in failing to find that the respondent's Notice of Motion Application dated **13th July 1993** was misconceived and bad in law and having been filed in the lower court as opposed to the High Court which is bestowed with jurisdiction to give orders to transfer from one court to another;*

*(iii) the Learned Judge erred in both fact and law in finding that the subordinate court had jurisdiction to hear the respondent's suit to wit **PMCC NO.918 of 1991** at the time it was filed before it;*

*(iv) the Learned Judge erred in both fact and law in finding that the reason for the transfer of the respondent's suit **(PMCC NO.918 of 1991)** from the subordinate court to the High Court was to enable the respondent to claim a higher sum in damages than the subordinate court had the jurisdiction to award at that time;*

*(v) the Learned Judge erred in both fact and law in finding that the appellant had consented to or acquiesced to the transfer of the suit **(PMCC NO.918 of 1991)** from the subordinate court to the High Court; and*

(vi) the Learned Judge erred in both fact and law in failing to consider the mandatory provisions of the Civil Procedure Act before arriving at her decision

14. The appeal was agitated by way of written submissions as well as oral highlights during the plenary hearing. It was the appellant's firm stand that the subordinate court lacked the pecuniary jurisdiction to entertain the suit. Both parties are in agreement that the pecuniary jurisdiction of the subordinate court where the matter was filed in the first instance was Ksh.125,000.00. Mr. H. Shah, learned counsel who appeared for the appellant at the hearing maintained that the High Court had no jurisdiction to transfer the suit as the same was *void ab initio*. He denied that the suit was transferred by consent of the parties saying that the consent letters on record was transferring the suit from one division of the High Court to the other.

15. Placing reliance on this Court's decision in **George C. Gichuru v. Senior Private Kioko & Another (2013) eKLR,** learned counsel posited that even where there is consent of the parties, such consent cannot confer jurisdiction. On the issue of delay, counsel submitted that even lapse of time cannot cure the issue of jurisdiction. For this proposition he relied on the case of **Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR: where the Court expressed:-**

> ***"It is our considered view that passage or lapse of time does not and cannot confer jurisdiction; jurisdiction is a continuum, jurisdiction cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present ab initio or absent forever."***

Learned counsel urged us to allow the appeal.

16. Opposing the appeal, **Mrs. Wambua-Radoli** learned counsel for the respondent, maintained that the suit was properly filed before the subordinate court. On the issue of pecuniary jurisdiction, her submission was that the claim had not been properly set out, but the magistrate could still have heard the matter and awarded Kshs.125,000/- which it had jurisdiction to award. She supported the learned Judge's finding that the application was made in bad faith, it having been made too late after the transfer. She maintained that the application was properly filed before the High Court which had arrived at the correct findings. She could not nonetheless answer the question as to whether parties could by consent confer jurisdiction to a court where none existed.

17. Ms. Wambua informed the Court that the substantive suit proceeded to hearing before the High Court (Sewe J) and judgment had already been entered in favour of the respondent on 2nd September, 2016. That decision is the subject of **CIVIL APPEAL NO.6 OF 2018 PHOENIX EAST AFRICA ASSURANCE CO. LTD v. S.M. THIGA T/A NEWSPAPER SERVICES** currently pending determination before this Court. It is opportune for us to say that the outcome of this appeal will determine the fate of Civil Appeal No. 6 of 2018. If we find that the suit was filed before a court bereft of jurisdiction, the principle encapsulated in the time honoured *locus classicus* case of **Macfoy v United Africa Co LTD [1961] 3 All ER, 1169**, comes into play and Appeal No. 6 of 2018 would therefore fall by the wayside. In that case 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…"*** (Emphasis ours)

18. We have carefully considered the record, the submissions by counsel and the law. The main issue is whether the subordinate court had jurisdiction in the first place to entertain the respondent's suit.

According to the appellant, the court had no jurisdiction and the suit was a nullity *ab initio* and it could not therefore be transferred to the High Court whether by consent or otherwise. On the other hand, the respondent seems to be saying that the subordinate court had jurisdiction to hear the suit but only award damages that were within its pecuniary jurisdiction, and therefore the suit was transferable to the High Court.

19. We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another *locus classicus* in this subject, this Court pronounced; **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):**

> ***"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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction….Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."***

These words were echoed by this Court in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR** in the following words:-

> ***"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 S.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 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 same.***
>
> ***…In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer."*** (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of **Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR** is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

> ***"When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction.***
>
> ***We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.***

20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity *ab initio* and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. **CIVIL APPEAL NO. 6 OF 2018 PHOENIX EAST AFRICA ASSURANCE CO.LTD v. S.M. THIGA T/A NEWSPAPER SERVICES** is therefore a nullity as it was based on a nullity. We have said enough to demonstrate that this appeal has merit. We allow it with costs to the appellant.

This judgment also applies to **Civil Appeal No. 6 of 2018.**

Dated and delivered at Nairobi this 10th day of May, 2019.

W. KARANJA

……

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR