



Alcott Wiz Trading Co., Ltd & 2 others v Jotun (K) Limited (Miscellaneous Application E091 of 2023) [2023] KEHC 2742 (KLR) (Commercial and Tax) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 2742 (KLR)

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

MISCELLANEOUS APPLICATION E091 OF 2023

DAS MAJANJA, J

FEBRUARY 24, 2023

BETWEEN

ALCOTT WIZ TRADING CO., LTD 1ST APPLICANT

BENSON MUTURI WAMBUI 2ND APPLICANT

ANNE WANJA MUNGAI 3RD APPLICANT

AND

JOTUN (K) LIMITED RESPONDENT

RULING

1. In the application before the court dated 7th February 2023, the Applicants seek an order that this court transfer Nairobi Small Claims Court Case No. E7214 of 2022 to the Nairobi Magistrates Court, Milimani.
2. The grounds and reasons for the application are detailed in the supporting affidavit sworn by the 2nd Respondent on 8th February 2023. Though the Respondent was served, it did not oppose the application. It is nevertheless the duty of the court to satisfy itself that the application is indeed merited.
3. The Respondent, as Claimant before the Small Claims Court, filed a Statement of Claim dated 10th November 2022 seeking judgment for Kshs. 1,000,000.00 on account of goods sold and delivered. The Applicants, in their Response to the Statement of Claim dated 15th December 2022 prayed that the claim be dismissed. They also filed a counterclaim seeking judgment for Kshs. 2,232,000.00 on account of the balance due to them by the Respondent on account of the purchase of MCD paint mixing machine. In view of their counterclaim, the Applicants filed a Notice of Preliminary Objection dated 15th December 2022 seeking to have the suit stayed and transferred to the Magistrates Court on the ground that the Small Claims Court lacked jurisdiction to hear and determine the matter in view



of the pecuniary jurisdiction of the Small Claims Court limited to Kshs. 1,000,000.00 by the *Small Claims Court Act*, 2016 (“the SCCA”) since their counterclaim exceeded the jurisdiction of that court.

4. Before this court, the Applicants raise the same issues raised in the Preliminary Objection before the Small Claims Court. In addition, the Applicants contend that the claim and counterclaim arise from the same transaction hence it would be convenient for the matter to be handled by the Magistrates Court.
5. I have considered the grounds proffered by the Applicants and I hold as follows. It is not in doubt that the Small Claims Court is a court of limited jurisdiction. Its pecuniary jurisdiction is limited to Kshs. 1,000,000.00. As regards the Respondent’s claim, the court has jurisdiction to deal with the claim hence it is erroneous for the Applicants to argue that the court lacks jurisdiction to deal with the Respondent’s claim.
6. The Applicants, on the hand, have filed a counterclaim that is beyond the pecuniary jurisdiction of the court. A counterclaim is for all intents and purposes a separate suit and by filing a counterclaim that is clearly outside the pecuniary jurisdiction, the Applicants invite the court to exercise its peremptory powers to strike out the counterclaim. In addition, Rule 14 of the Small Claims Court Rules gives a respondent who wishes to file a counterclaim whose value exceeds the pecuniary jurisdiction of the court various options. It provides as follows:
 - 14(1) A respondent who has a counterclaim exceeding one million shillings may-
 - a. Abandon that part of the counterclaim exceeding one million shillings;
 - b. Pursue his or her counterclaim in the proceedings and recover the amount not exceeding one million shillings; or
 - c. File a separate claim in the Magistrates’ Court to recover the whole of the amount counterclaim.
 - (2) A respondent who abandons that part of the counterclaim exceeding one million shillings shall state in his or her response that the amount in question is abandoned. (Emphasis mine)
7. In this case, the Applicants invite the court to transfer the suit before the Small Claims Court to the Magistrates Court on account of a counterclaim filed in a court without jurisdiction. It is now a settled principle that the court will not transfer a suit filed in court without jurisdiction to another court of competent jurisdiction. In *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour and Travel* MSA CA Civil Appeal No. 13 of 2016 [2016] eKLR, the Court of Appeal observed 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 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.

8. Later in Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service NRB Civil Appeal No. 244 of 2010 [2019] eKLR the Court of Appeal reiterated that:

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint 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 upon itself...

9. Since the Counterclaim, which for all intents and purposes, forms the basis of the application to transfer the suit, I am constrained to reject the application dated 7th February 2023. It is dismissed but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 24th DAY OF FEBRUARY 2023

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mwangi instructed by Micere Advocates for the Applicants.

