



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO E1312 OF 2020

HANNAN ARYA ENERGY (K) LIMITED.....1ST APPLICANT

TUNCAY ASLAN EKREM.....2ND APPLICANT

VERSUS

ABDULLAH GAIA ADAN.....RESPONDENT

RULING

1. Before me is a Motion on Notice dated 16/12/2020. It was brought under **Order 50 Rule 1 of the Civil Procedure Rules, 2010, Sections 3A, 18(1) (b) of the Civil Procedure Act, Chapter 21, Sections 3, 239 and 240 of the Companies Act, 2015 Laws of Kenya.**
2. The Motion sought the transfer of **NAIROBI MCOMMSU NO. E953 OF 2020- HANNAN ARYRA ENERGY (K) LIMITED & TUNCAY ASLAN EKREM =VERSUS- ABDULLAH GAIA ADAN** (“the said suit”) from the Chief Magistrate’s Court, Nairobi to this Court.
3. The application was supported by the affidavit of **Leonard Anyonje** sworn on 16/12/2020. The grounds were that; the applicants filed the said suit in the Chief Magistrate’s Court whereby the subject matter was USD 118,000. However, on 1/12/2020, the plaintiff was amended raising the value of the subject matter to Kshs. 21,462,302/=. That was beyond the jurisdiction of the lower court.
4. The applicants had paid Kshs. 70,900/= as filing fees. It was therefore contended that in light of that payment and the overriding objective dictating affordability and expeditious disposal of matters, it was just for the matter to be transferred to this Court for determination.
5. The Motion was opposed vide grounds of opposition dated 8/2/2021. The respondent contended that as demonstrated in the amended plaint, the lower court lacked jurisdiction to hear the matter. That the applicants did not follow the procedure for bringing a derivative suit against the respondent.
6. That the lower court also lacked jurisdiction to make the directions sought from the registrar. Further, it lacked jurisdiction to hear matters regarding internal company affairs. In the premises, the suit was filed without jurisdiction and was therefore *null ab initio*. That the suit was not transferable to another court.
7. Both parties filed their respective submissions which I have carefully considered. It was urged by the applicants that the Court had unfettered discretion under **section 18 (1) (b) of the Civil Procedure Act** to transfer the suit as sought. Nothing limited the special jurisdiction and inherent power conferred upon this court by law for the ends of justice under **sections 3 and 3A of the Civil Procedure Act**. That **Article 159 2(b), (d) and (e) as read with Article 50 (1)** dictates that justice be administered without undue regard to procedural technicalities and without delay.
8. That the suit was not *null ab initio* as in the original plaint, the value of the subject matter was USD 118,000 which was within the jurisdiction of the subordinate court. That it was the amendment of plaint that took the suit out of the jurisdiction of the subordinate court. This is because as it varied the value of the subject matter to Kshs. 21,462,302/=. The case of **Acqualine Distributors Ltd v Coastal Bottlers Ltd [2020] Eklr.** was cited in support of those submissions.
9. It was further submitted that the original plaint did not seek orders directed at the Registrar of Companies but were introduced in the amended plaint hence the suit could not be *null ab initio*. The case of **Salim Abdalla vs Swabra Abdalla(2018) Eklr.** was relied on in support of that submission.

10. It was finally submitted that that the 1st applicant did not need to seek leave as it was not pursuing a derivative claim. That in any case leave to commence a derivative claim could be sought prior to filing the claim or at any stage of the suit.

11. For the respondent, it was submitted that the suit was filed in a court without jurisdiction. That the suit was therefore a *nullity ab initio* and it could not be transferred to another court. That even before the amendment, the suit concerned the internal affairs of a company and sought directions to the registrar of companies. That pursuant to **sections 3 and 238 (2) of the Companies Act 2015** original jurisdiction over such matters was vested in the High Court. That the applicant sought to commence a derivative suit in the name of the 1st Applicant and this ought to have been determined by the High Court.

12. The Court has considered the depositions and submissive on record. The issue for determination is whether the said suit ought to be transferred to this court for determination. It was the respondent's contention that the suit was filed in a court without jurisdiction and was therefore *null and void ab initio*. It was contended that the suit exceeded the pecuniary jurisdiction of the lower court and that it sought orders directed at the registrar of companies for which the subordinate court lacked jurisdiction.

13. I have seen the original plaint dated 10/11/2020. The subject matter was a contract allegedly entered illegally by the respondent on behalf of the 1st applicant valued at USD 118,000. There was no order directed at the Registrar of Companies.

14. In the amended plaint dated 1/12/2020, the claim was increased to Kshs. 21,462,302/=. It also introduced new facts including that the respondent allegedly lodged forged documents at the company registry effectively allocating himself 100% of voting rights thereby stripping the 2nd applicant's voting rights to 0%. It was on this account that the applicant introduced new prayers seeking directions to the registrar to *inter alia* rectify the register and revert the voting rights to 50-50.

15. From the foregoing, it is clear that the suit was initially properly filed before the Magistrate's court. The value of the subject matter was well within the Magistrate's pecuniary jurisdiction. It is the amendment of 1/12/2020 that stripped that court of jurisdiction.

16. From the above, I find that the suit filed in the lower court was not defective for lack of jurisdiction. The respondent's argument that the suit was *null ab initio* fails. At the time of filing, the subordinate court was well vested with jurisdiction to determine the matter. It was the subsequent amendment that took the suit out of the subordinate court's jurisdiction.

17. The authorities relied on by the respondent are therefore not applicable in this matter. They all related to suits which on the face of it, were filed in a court that lacked jurisdiction to hear the matters *ab initio*.

18. On the issue of failure to follow the procedure for bringing a derivative suit, that is an issue to be raised in the defence. The application for leave can be made at any stage to commence or continue a derivative suit. See **Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u [2016] Eklr.**

19. **Section 18 of the Civil Procedure Act** gives this Court the power to transfer a case instituted in the lower courts. Further, the overriding objective of the Act stipulate that the objective of legislation is to facilitate just and efficient resolution of disputes.

20. In **Hangzou Agrochemicals Ltd v Panda Flowers Ltd [2012] Eklr.**, the court quoted with approval the holding in **David Kibungu v Zikarenga & 4 Others, Kampala HCCS No. 36 of 1995** wherein it was held: -

"... Section 18(1) (b) of the Civil Procedure Act, 2010 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. ... 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..."

21. In the present case, although the amendments are deemed to have related back to the date of the suit, since they came subsequent to the lodging of the suit, the lower court had initial jurisdiction. I will here reiterate the words of P. J. Otieno J in **Acqualine Distributors Ltd v Coastal Bottlers Ltd [2020] Eklr.**, when he stated: -

"In doing so, this court will be furthering its obligation to give effect to the overriding objective ... The court is also saying that when filed the suit was before a proper court but that situation was altered by the order for amendment. ... I chose to consider the cause pleaded before the amendment and find in favour of sustaining the suit for hearing on the merits rather than leaning towards its defeat on account of jurisdiction".

22. In the present case, I have considered that the applicants have paid the full filing fees for the claim. That no prejudice will be suffered by the respondent. That the issues raised by the respondent can properly be dealt with once the matter is before this Court.

23. Accordingly, I find that the application is meritorious and I allow the same as prayed. The costs will be in the cause.

It is so ordered.

DATED and DELIVERED at Nairobi this 24th day of June, 2021.

A. MABEYA, FCI Arb

JUDGE