



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. E021 OF 2021

OCEANIC TOWERS LIMITED.....PLAINTIFF

-VERSUS-

HUSSEINI BUILDERS LIMITED.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 26th February, 2021 brought under the provisions of Sections 1A, 1B, 3A, 6 and 18 of the Civil Procedure Act and all other enabling laws. The plaintiff seeks the following orders -

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) That this Honourable Court be pleased to withdraw and transfer the aforementioned case, Mombasa CMCC No. 2105 of 2019 - Hussein Builders Limited vs Oceanic Towers Limited to this Court for trial and final disposal;

(v) That this Honourable Court do consolidate the aforementioned case, Mombasa CMCC No. 2105 of 2019 - Hussein Builders Limited vs Oceanic Towers Limited with this suit for trial and final disposition (sic); and

(vi) That the costs of this application be provided for.

2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on 26th February, 2021 and a supplementary affidavit sworn on 7th April, 2021 by Mitesh Visaria, the plaintiff's director. In opposition to the said application, the defendant on 16th March, 2021 filed a replying affidavit sworn by Sajjad Hussein Moosajee, one of the defendant's directors.

3. The application was canvassed by way of written submissions. The plaintiff's submissions were filed on 9th April, 2021, by the law firm of A. B. Patel & Patel Advocates while the defendant's submissions were filed by the law firm of Onyango Ndolo & Company Advocates on 6th May, 2021.

4. Mr. Anjarwalla, learned Counsel for the plaintiff submitted that the suit herein and the one in the subordinate Court, being Mombasa CMCC No. 2105 of 2019, emanate from a contract between the parties herein, whereby the defendant was to carry out aluminum and glazing work on the plaintiff's property. He indicated that in the said Court, the amount claimed by the defendant against the plaintiff is Kshs. 13,496,000.00, while in the suit herein, the claim by the plaintiff is for more than Kshs. 20,000,000/=, being the damages suffered by the plaintiff for breach by the defendant in carrying out certain works that it was contracted to perform.

5. He submitted that the *ex-parte* judgment which had been entered irregularly and the consequential decree and order made in Mombasa CMCC No. 2105 of 2019 were set aside, thus there is no judgment in the subordinate Court. He indicated that the said case had not been heard. He further submitted that Section 18 of the Civil Procedure Act gives this Court the powers to transfer suits as prayed in the present application.

6. Mr. Anjarwalla relied on the case of **AO Basid Limited v ASL Credit Limited** [2019] eKLR, where in approval of the decision in **David Kabungu v Zikarengu & 4 others**, Kampala HCCS No. 36 of 1995, the Court stated as follows-

“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.....”

7. It was submitted by the plaintiff's Counsel that this Court should take into consideration the balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. He urged that where the claims were above the pecuniary jurisdiction of the subordinate Court, the matters should be transferred to the High Court as per the holding by the Court in the case of **AO Basid Limited v ASL Credit Limited** (supra).

8. He stated that since the issues and the witnesses are the same in the case before the subordinate Court and the present case, it makes sense for both matters to be heard together as it would reduce the expense and hardship caused by multiple suits and witnesses having to come to Court on multiple occasions.

9. Mr. Ndolo, learned Counsel for defendant submitted that the defendant's claim against the plaintiff is for the outstanding payment of Kshs. 13,496,000.00 which claim can and should be dealt with by the subordinate Court and not this Court. He contended that the plaintiff's claim herein for additional monies above Kshs. 20,000,000/= is not justified as there is no material evidence placed before this Court to substantiate that allegation. He submitted that the plaintiff had not met the test for grant of the order of stay of proceedings and that this application is only meant to delay the finalization of the case pending before the Magistrate's Court.

10. He relied on the case of **Global Tours and Travels Limited** Nairobi HC Winding Up Cause No. 43 of 2000, where it was held that in deciding whether to order a stay of proceedings or further proceedings, the Court should essentially weigh the pros and cons of granting or not granting the order, and in doing so, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not, but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously. He submitted that bearing in mind the case that he had cited, it would not be in the interest of justice for this Court to exercise its discretion by granting the plaintiff stay of proceedings in Mombasa CMCC No. 2105 of 2019 as it would only serve the purpose of delaying the matter which is pending in the lower Court. Mr. Ndolo submitted that the threshold for stay of proceedings is well explained in **Halsbury's Laws of England, 4th Edition**. Vol. 37 pages 330 and 332.

11. He stated that the guiding provisions of the law in deciding on whether or not to transfer a suit is found in Section 18 of the Civil Procedure Act, Cap 21 Laws of Kenya. He relied on the case of **Kithita Ngeana v Mwaniki Kisume** [2018] eKLR, where the Court considered the circumstances that would move a Court to grant an order for transfer of a suit from one Court to another one. The respondent's Counsel argued that as much as the plaintiff alleges that the amount claimed is more than Kshs. 20,000,000/=, it failed to produce any evidence to support the allegation to warrant this Court to make a finding that indeed Mombasa CMCC No. 2105 of 2019 should be transferred to this Court. He was of the view that the fact that still stands was that the dispute between the plaintiff and the defendant herein is an outstanding sum of Kshs. 13,496,000.00. He contended that the plaintiff's allegation of whether the defendant discharged its contractual obligations in accordance to the required standard could be determined by the Magistrate's Court which has requisite jurisdiction to determine the matter, unless proved otherwise.

12. Mr. Ndolo stated that the principles for consolidation of suits are set out in the case of **Nyati Security Guards & Services Ltd v Municipal Council of Mombasa** [2000] eKLR, where it was held that the situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same Court; where some common questions of law or fact arise in both or all of them; the rights or reliefs claimed in them are in respect of or arise out of the same transaction; and if for some other reason, it is desirable to make an order consolidating them.

13. He indicated that it was not in dispute that the two cases are distinct from each other and they should not be consolidated as they do not deal with common issues of fact and law and that the rights and relief sought in both matters are different.

ANALYSIS AND DETERMINATION

14. This Court has considered the application filed herein, the affidavit filed in support thereof as well as the supplementary affidavit filed by the applicant. The Court has also borne in mind the replying affidavit filed by the defendant and the written submissions by both Counsel in making a decision herein. The issue that arises for determination is whether the application dated 26th February, 2021 is merited.

15. In the affidavit filed by the plaintiff, it deposed that on 25th November, 2019, the defendant herein filed Mombasa CMCC No. 2105 of 2019 - Hussein Builders Limited vs Oceanic Towers Limited against the plaintiff herein, which is still pending before the subordinate Court. That the issues raised therein are the same as the ones in the instant suit and therefore, it would be proper to transfer the subordinate Court case to the High Court and consolidate the two cases so that all the issues between the parties can be heard and determined at the same time. The plaintiff also averred that consolidating the subordinate Court case and this suit would result in saving the Court's time.

16. The plaintiff deposed that in the subordinate Court case, where it is the defendant, it has claimed that the plaintiff therein, who is the defendant herein, did not honour its obligations, as a result of which the plaintiff herein has suffered losses and damages which it claims. The plaintiff herein further deposed that the central issue in both suits is whether the defendant herein carried out its contractual obligations in accordance with the required standards.

17. The plaintiff deposed that this Court is clothed with pecuniary jurisdiction to hear and determine both the subordinate Court case and this matter since the pecuniary jurisdiction of the subordinate Court is Kenya is Shillings Twenty Million, yet the plaintiff's claim is higher. It stated that it is in the interest of justice to avoid a multiplicity of suits over the same or similar issues.

18. The defendant in its replying affidavit deposed that on 6th July, 2015, it entered into an agreement with Amrital Khimchand Shah, one of the plaintiff's directors, for aluminum glazing works to be done at a construction site in Kizingo, referred to as land Title No. Mombasa/Block XXVI/10623. That on the same day, the defendant issued the plaintiff with a quotation for the works and value of the equipment for Kshs. 54,000,000/=. The defendant indicated that the plaintiff agreed to the works and proceeded to sign the quotation letters to form the basis of the contract.

19. The defendant averred that the works were valued and certificates issued upon establishing the quality and workmanship over a period of 6 months without any hitches up to an amount of Kshs. 48,000,000/=. That in the month of April (sic), the plaintiff's director one Amrital Khimchand Shah issued instructions for extra works that were valued at Kshs. 7,100,000/= but later, the defendant and the plaintiff could not agree on the last payment certificate.

20. The defendant deposed that on 25th November, 2019, the defendant moved the subordinate Court in Mombasa to seek legal redress for payment of the work done amounting to Kshs. 13,496,000/= but not paid by the plaintiff herein, which claim could be handled by the subordinate Court and not this Court.

21. The defendant also deposed that the plaintiff had not supplied sufficient material to show that this matter should be consolidated with Mombasa CMCC No. 2105 of 2019 and that it had not placed before this Court any and/or other evidence to suggest that the plaintiff was claiming additional monies beyond Kshs. 20,000,000/= to justify that this matter should be heard and determined in the Commercial and Admiralty Division of the High Court.

22. The defendant averred that the place of suing is determined by Section 11 and 18 of the Civil Procedure Act and where suits have been filed in the wrong Court, this Court should exercise its authority to return the plaint to be presented to the Court in which the suit should have been instituted. It further averred that the Magistrate's Court has the pecuniary jurisdiction to hear and determine this matter and that pursuant to Section 18(a) of the Civil Procedure Act, the High Court has the power to transfer this suit to the subordinate Court.

23. It was stated by the defendant that the suits should not be consolidated as the cause of action is not the same as in CMCC 2105/2019, the plaintiff seeks payment of the outstanding amount for work done, while in the present suit, the issue for determination is whether the defendant discharged its contractual obligation in accordance with the required standards. The defendant stated that it would be greatly prejudiced if the suits were consolidated, as default judgment of Kshs. 13,496,000/= had already been entered in favor of the defendant in Mombasa CMCC 2105/2019.

24. The defendant deposed that the plaintiff was forum shopping having obtained stay orders of execution of the decree issued on the 3rd February, 2020 and that the present application was tantamount to a gross abuse of the judicial process. The defendant urged this Court to either dismiss the application herein in its entirety or transfer this matter to the Magistrate's Court in Mombasa, which is competent to try and dispose of the same.

25. In response to the defendant's replying affidavit, in its supplementary affidavit, the plaintiff deposed that in an interlocutory application, this Court cannot determine final issues with respect to the performance by the defendant of the works it was contracted to carry out. It further stated that it was not true that work valuations were carried out and that certificates were provided.

26. The plaintiff also deposed that it severally highlighted to the defendant the breaches it had occasioned as a result of which no monies were due to it.

27. The plaintiff averred that it was not true that there was a judgment in Mombasa CMCC No. 2105 of 2019 since the *ex-parte* judgment and all consequential orders were set aside

28. The plaintiff deposed that given that the amount it was claiming herein was more than Kshs. 20 Million, the matters cannot be heard by the subordinate Court due to the pecuniary jurisdiction thereof.

29. The plaintiff averred that at paragraph 18 of the defendant's replying affidavit, it was admitted that the issue in this case is whether the defendant discharged its contractual obligations as required. The plaintiff stated that it is in the interest of justice that the application herein be allowed since the witnesses in both matters would be the same, namely, the representatives from the plaintiff and the defendant and expert witnesses.

30. The jurisdiction of the High Court to transfer suits from one Court to another is provided under Section 18 of the Civil Procedure Act which states as follows-

“(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.”

31. In the case of **David Kabungu v Zikarenga & 4 others** Kampala HCCS No. 36 of 1995, the Court had the following to say on the circumstances under which the order to transfer suits may be granted-

“Section 18(1) 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 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 or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a 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 expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused.....”

32. In the present case, the plaintiff's position is that the claim in the present case is more than Kshs. 20,000,000/= which is above the pecuniary jurisdiction of the Magistrate's Court, thus it would be in the interest of justice to transfer Mombasa CMCC No. 2105 of 2019 to the High Court for hearing and determination. The defendant on the other hand contends that the plaintiff has not availed any material and/or evidence to show that the claim before the High Court is more than Kshs. 20,000,000, and as such, the application herein should be dismissed and/or the suit herein should be transferred to the Magistrate's Court for hearing and determination.

33. It is the defendant's case that it will be greatly prejudiced if the suits are consolidated as default judgment had been entered in its favour in the sum of Kshs. 13,496,000/= in Mombasa CMCC No. 2105/2019. Contrary to the defendant's contention, it is not in doubt from the plaintiff's supplementary affidavit filed on 9th April, 2021, that on 14th August, 2020, Hon. C. Ndegwa, Senior Principal Magistrate, set aside the *ex-parte* judgment irregularly entered on 21st January, 2020, together with the consequential decree and orders made thereon. It is thus evident that there is no interlocutory judgment currently in place in Mombasa CMCC No. 2105 of 2019. Additionally, the suit is yet to be heard and determined.

34. It is apparent from the pleadings in this case and in Mombasa CMCC No. 2105 of 2019 that the parties in both suits are the same, the issues in dispute in both suits arise from the same contract of service and as correctly submitted by the plaintiff's Counsel, the witnesses in both cases will most likely be the same as the matters in issue arise from the same contract.

35. Looking at the pleadings which have been filed before the subordinate Court, which were annexed to the plaintiff's supporting affidavit sworn on 26th February, 2021, the defendant therein indicated in its statement of defence that the subordinate Court has no jurisdiction to hear and determine the matter therein on account of the fact that the defendant therein has a counter-claim against the plaintiff for a sum greater than the pecuniary jurisdiction of the subordinate Court. Looking further at the said statement of defence, the defendant therein averred that it is entitled to a sum in excess of Kshs. 60,000,000/= which the plaintiff is well aware of.

36. In the plaint filed herein on 26th February, 2021, the plaintiff claims damages of Kshs. 22,174,666.20.00 against the defendant. It is therefore evident, considering the fact that the pecuniary jurisdiction of the Chief Magistrates' Court is limited to the sum of Kshs. 20,000,000/=, that the present suit is incapable of being heard before the Magistrate's Court. This Court is therefore satisfied that the plaintiff has demonstrated that if Mombasa CMCC No. 2105/2019 and the suit herein are allowed to proceed in two different Courts, there is a risk of getting two conflicting judgments thus causing an injustice to both parties herein as none of them shall be in a position to execute its decree.

37. Section 1A(1) of the Civil Procedure Act provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Section 1B(1) of the said Act provides as follows-

“For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

38. If this Court was to allow Mombasa CMCC No. 2105/2019 to proceed in the Magistrate's Court it would be working contrary to the intended purpose of the overriding objective. It would lead to wastage of time by two courts hearing 2 cases which could have been heard and determined in one suit. I therefore hold that it is in the interest of justice to transfer Mombasa CMCC No. 2105/2019 to the High Court for hearing and determination in accordance to the provisions of Section 18(1)(b)(i) of the Civil Procedure Act, Cap 21 Laws of Kenya. In

addition, once the said suit has been transferred to the High Court, the same shall be consolidated with the suit herein for reasons I have highlighted hereinabove so as to avoid having a multiplicity of suits involving the same parties over the same subject matter.

39. In sum, the application dated 26th February, 2021 is merited and the same is allowed in the following terms-

(i) That there be and is hereby issued an order withdrawing and transferring Mombasa CMCC No. 2105 of 2019 - Hussein Builders Limited vs Oceanic Towers Limited to the Mombasa High Court for trial and final disposal;

(ii) That there be and is hereby issued an order consolidating Mombasa CMCC No. 2105 of 2019 - Hussein Builders Limited vs Oceanic Towers Limited with the suit herein for trial and final disposal.

(iii) The costs of the application dated 26th February, 2021 shall abide the outcome of the consolidated suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 24TH DAY OF SEPTEMBER, 2021.

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Mutune holding brief for Mr. Anjarwalla for the plaintiff/applicant

No appearance for the defendant/respondent

Mr. Oliver Musundi – Court Assistant.